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The Fifth Freedom: The Constitutional Duty to Provide Public Education

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THE FIFTH FREEDOM: THE CONSTITUTIONAL DUTY TO PROVIDE PUBLIC EDUCATION

*Areto A. Imoukhuede**

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The fifth freedom is freedom from ignorance. It means that every[one], everywhere, should be free to develop his [or her] talents to their full potential—unhampered by arbitrary barriers of race or birth or income.

Lyndon B. Johnson

We have an obligation and a responsibility to be investing in our students and our schools. We must make sure that people who have the grades, the desire and the will, but not the money, can still get the best education possible.

Barack Obama (October 2004)¹

I. INTRODUCTION

There is a pervasive ethos in America that there should be an equal opportunity for all, regardless of race, class, or lineage, to attain whatever amount of wealth, professional prestige, and social status that our hard work and overall merit entitle us. Most in America believe society ought to guarantee equality of opportunity to succeed but not equality of results. However, in order to make the argument that equality of opportunity is superior to equality of results, there must first exist a genuine opportunity for every individual to “develop his [or her] talents to their full potential—unhampered by arbitrary barriers of race or birth or income.”²

Social inequality is justified as the necessary result of a *free* market competition amongst individuals. The *free* in free market competition is italicized to emphasize that for any competition to be equal or fair, there must exist a means of assuring that everyone is similarly equipped. However, free market competition alone cannot serve as morally justifying the coexistence of poverty alongside enormous wealth. The meritocratic effects of intergenerational privilege must be equalized for there to be a semblance of equal opportunity that can begin to justify unequal results and pervasive social inequality.³ An equitable

1. Ronald Roach, *Obama Rising*, BLACK ISSUES IN HIGHER EDUCATION, Oct. 7, 2004, at 20.

2. President Lyndon B. Johnson, Special Message to the Congress on Education: the Fifth Freedom (Feb. 5, 1968) (Presidential Papers, 54) [hereinafter Presidential Papers].

3. Ann I. Park, Comment, *Human Rights and Basic Needs: Using International Human Rights Norms to Inform Constitutional Interpretation*, 34 UCLA L. REV. 1195, 1205-06 (1987) (“The prevailing view is that human welfare is best guaranteed by the ‘free market,’ which

distribution of the foundational tools required for success in both the market and for democratic participation is necessary. America relies on education as the foundation for justifying what is presumed to be an American meritocracy where equality of results is not a legitimate end for the government to pursue.

Many Americans would likely say that based on these equality concerns, the right to public education is logically more fundamental than the right to interstate travel, but under current precedent, it is interstate travel that is more fundamental.⁴ Therefore, any law undermining the fundamental right to travel is accorded strict scrutiny and is thereby presumptively unconstitutional.⁵ Education rights do not receive similar treatment.⁶ Unlike travel, education is subject to a rational basis test, which is the most relaxed test of equal protection scrutiny.⁷ However, the rights to public education and travel are fundamentally different, so that education should not be subject to the same form of constitutional protection as the right to travel. The concern with the right to travel is the freedom from government action, whereas the central aim of a public education right is for government to act. The entire point of a right to public education is for government to guarantee what President Lyndon B. Johnson called the fifth freedom. "The fifth freedom is freedom from ignorance."⁸

Thus, there is a necessity for high-quality public education, particularly primary and secondary education, which is the focus of this Article.⁹ In 1968, President Lyndon B. Johnson proclaimed the duty to provide public education as *the fifth freedom*.¹⁰ In doing so, President Johnson recognized that education—*the freedom from ignorance*—is an essential human right that is of equal standing with what President Franklin D. Roosevelt described as the "four essential human freedoms."¹¹

offers infinite economic opportunity to provide for the well-being of all Americans, if only people would exert themselves properly. However, the myth of equal economic opportunity is belied by the demographic reality").

4. See *Shapiro v. Thompson*, 394 U.S. 618, 661 (1969) (holding that regulation "touch[ing] on the *fundamental right* of interstate movement" must promote a compelling state interest) (emphasis added). See also JESSE L. JACKSON, JR. & FRANK E. WATKINS, *A MORE PERFECT UNION ADVANCING NEW AMERICAN RIGHTS* 330 (1st ed. 2001).

5. See *id.* at 660.

6. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 121-22 (1973).

7. *Id.* at 62; Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1157 (1999) ("[A]ny reasonably conceivable state of facts . . . could provide a rational basis for the classification. . .").

8. Presidential Papers, *supra* note 2, at 54.

9. This Article deals with primary and secondary education and does not attempt to address higher education.

10. See Presidential Papers, *supra* note 2, at 54.

11. See President Franklin D. Roosevelt, State of the Union Address to the 77th Congress,

Without President Lyndon B. Johnson's *fifth freedom* in the form of public education, there is no equal opportunity for those born to less wealthy, less privileged families.¹² Public education is a means by which governments ensure that all people enter the market with the foundational tools to compete without handicap or unfair disadvantage arising from the intergenerational effects of wealth that lie outside an individual's control.¹³ Without providing an education system adequate to provide equal opportunity, the U.S. founding values of equality will be compromised. At least since *Brown v. Board of Education*, the U.S. Supreme Court has explicitly recognized the significance of education to the contemporary American experience.¹⁴

The national wealth of the United States makes the realization of a fundamental right to public education a real possibility.¹⁵ Unfortunately, the Supreme Court's liberty-centered constitutional rights doctrine has short-circuited what otherwise should have been a realization of a constitutional duty to provide public education.¹⁶ The infamous *San Antonio v. Rodriguez* holding that the U.S. Constitution does not explicitly protect a right to public education is dubious since the Court already recognizes many rights that find no explicit support in

in 1940 PUB. PAPERS AND ADDRESSES OF FRANKLIN D. 663, 672 (Jan. 6, 1941). In his 1941 State of the Union Address, President Roosevelt proclaimed the four essential freedoms are: (1) Freedom of Expression, (2) Freedom of Worship, (3) Freedom from Want, and (4) Freedom from Fear. These four freedoms were later artistically memorialized as American icons by Norman Rockwell's famous Four Freedoms Series in the Saturday Evening Post in 1943. See Norman Rockwell, *Freedom from Fear*, SATURDAY EVENING POST, Mar. 13, 1943; Norman Rockwell, *Freedom of Speech*, SATURDAY EVENING POST, Feb. 20, 1943; Norman Rockwell, *Freedom from Want*, SATURDAY EVENING POST, Mar. 6, 1943; Norman Rockwell, *Freedom to Worship*, SATURDAY EVENING POST, Feb. 27, 1943; Norman Rockwell's Four Freedoms (last visited Oct. 25, 2010), available at <http://www.best-norman-rockwell-art.com/four-freedoms.html>.

12. President Johnson announced that *freedom from ignorance* ought to be added to FDR's list of essential human freedoms as the *fifth freedom*. Presidential Papers, *supra* note 2, at 54; Mark R. Shulman, *The "War on Terror" Its Over-Now What? Restoring the Four Freedoms as a Foundation for Peace and Security*, 3 J. NAT'L SEC. L. & POL'Y 263, 297 (2009); see Mark R. Shulman, *The Four Freedoms: Good Neighbors Make Good Law and Good Policy in a Time of Insecurity*, 77 FORDHAM L. REV. 555, 557-72 (2008) (discussing the history of the Four Freedoms).

13. Molly S. McUsic, *The Future of Brown v. Board of Education: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1336 (2004) (suggesting that education is most improved when disadvantaged children are placed in wealthier schools).

14. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

15. See President Lyndon B. Johnson, Special Message to the Congress on Education: The Fifth Freedom (Feb. 5, 1968) (Presidential Papers, 54) [hereinafter Presidential Papers]; Ann I. Park, *Human Rights and Basic Needs: Using International Human Rights Norms to Inform Constitutional Interpretation*, 34 UCLA L. REV. 1195, 1228-32 (1987).

16. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17-19 (1973) (holding that there is no fundamental right to public education under the U.S. Constitution).

constitutional language.¹⁷ The holding that U.S. history, traditions, and developing cultural understandings do not warrant recognition of an implied fundamental right to public education is just plain wrong.¹⁸

The current doctrine, which wrongly states that there is no right to public education, flows from a profound confusion regarding fundamental rights as duties. Negative rights encompass what we traditionally consider to be civil liberties. These liberties function as bars to government actions that either discriminate against a protected class or infringe upon protected conduct. Viewed from the perspective of rights as liberties, the concern with declaring a fundamental right to public education is that strict scrutiny of education legislation would prevent the enactment of laws regarding education.¹⁹ This would not be a concern if the Court embraced a constitutional analysis that specifically applied to positive rights and duties.²⁰

Today's education problem is inextricably linked to race and wealth. Poor, urban, predominantly African American and Latino schools provide a quality of education that is substantially inferior to that of wealthier, suburban, predominantly white schools.²¹ The modern

17. See ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* § 10.1 (3d ed. 2006). Judicially recognized rights include: *Loving v. Virginia*, 388 U.S. 1 (1967) (right to interracial marriage); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (right to procreate); *United States v. Guest*, 383 U.S. 745 (1966) (right to interstate travel); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (right to direct a child's upbringing); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to privacy); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (right to abortion included in right to privacy); *Vacco v. Quill*, 521 U.S. 793 (1997) (right to refuse medical treatment).

18. See CHERMERINSKY, *supra* note 17.

19. *Plyler v. Doe*, 457 U.S. 202, 230-31 (1982) (Marshall, J., concurring); see *Rodriguez*, 411 U.S. at 61-62 (Stewart, J., concurring) (regarding strict scrutiny).

20. See Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of National Education Crisis*, 86 NW. U. L. REV. 550, 574-79 (1992) (discussing the application of positive rights).

21. See also Eric P. Christofferson, *Rodriguez Reexamined: The Misnomer of "Local Control" and a Constitutional Case for Equitable Public School Funding*, 90 GEO. L.J. 2553, 2553-55 (2002) ("[d]isparities in the quality of education from one school district to the next are both real and considerable).

Not surprisingly, achievement disparities among districts strongly correlate with disparities in wealth. School budgets are funded primarily through local property taxes, such that the total budget almost completely depends upon the individual school district's overall wealth. For example, the disparity in annual per pupil expenditures between the poorest school district and the wealthiest school district in Pennsylvania is nearly ten thousand dollars, which translates into roughly a five million dollar disparity per school per year. In an age in which most education experts agree that smaller classroom size translates into greater learning and achievement, we do not need experts to tell us how far five million dollars per year can go toward hiring more teachers and improving infrastructure to accommodate more students in healthier learning

euphemistic framing of so-called *urban* aspects to educational inequality is clearly demonstrated by significantly higher drop-out rates in many of the nation's major cities such as Chicago, where the rate has been as high as 40%.²² The 1985 National Commission on Excellence in Education reported that 13% of all seventeen year olds in the United States were functionally illiterate, while the functional illiteracy of minority youths was as high as 40%. Finally, the study found that schools with a high percentage of students who are one or more years below their grade level also had a high percentage of poor children and racial minorities.²³

Education problems in poor, urban, and predominantly minority communities are the result of numerous factors, including an antiquated curriculum, inexperienced and underpaid teachers, and higher student-to-teacher ratios when compared to wealthier, predominantly white suburban districts.²⁴ Factors in addition to school financing exacerbate the education problem. Students in poor, urban districts tend to have greater educational needs than students in the suburbs because of background factors such as poverty, poorly educated parents, malnutrition, high crime rates and limited English proficiency, to name a few.²⁵ It follows that merely equalizing funding to districts will not alleviate the pervasive problems of unequal education.²⁶ What is needed is full protection of the right to equal access to a high quality public education.

This Article explains why there is a fundamental duty for the

environments.

Id. (internal citations omitted); Brenna Bridget Mahoney, *Children at Risk: The Inequality of Urban Education*, 9 N.Y.L. SCH. J. HUM. RTS. 161, 162 (1991); Susan Aud et al., Dept. of Educ., *The Condition of Education 6-15* (2010), available at <http://nces.ed.gov/pubs2010/2010028.pdf> (discussing the quality of education in predominantly poor minority, black, Asian, Latino/a, areas; the inequity of results, the inequity of quality of teachers, the poorest having only bachelors degrees while the wealthiest have mostly masters degrees).

22. See Mahoney, *supra* note 21, at 167 ("Dropout rates are also significantly higher in many of the nation's major cities . . . 'Chicago's dropout rate in recent years was approximately 40%' . . .").

23. Emily Forrest Cataldi et al., Dept. of Educ., *High School Dropout and Completion Rates in the United States: 2007 Compendium Report*, 3-7 (2009).

24. See Mahoney, *supra* note 21, at 169.

25. *Id.*; see also ERICA FRANKENBERG ET AL., *A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM?* 5 (2003); see Mahoney, *supra* note 21, at 169.

26. The additional costs of attending urban schools include: support for students from low-income families, such as healthcare, counseling, remedial programs, and combating hunger, as well as the costs of vandalism, security, and the higher consumer price index in urban areas. Christopher E. Adams, *Is Economic Integration the Fourth Wave in School Finance Litigation?*, 56 EMORY L.J. 1613, 1630-31 (2007).

government to provide public education under the U.S. Constitution.²⁷ Numerous scholars and public officials have written on the need to overrule *San Antonio v. Rodriguez* or adopt alternative approaches to recognizing a right to public education either judicially or by way of constitutional amendment.²⁸ This Article identifies a consistent and systemic reluctance by the Court to meaningfully enforce positive rights, which are the duties that the government owes to the people. In doing so, it explores the consistent recognition throughout American history that education is a fundamental duty of government.

When the Supreme Court issued its infamous holding in *San Antonio v. Rodriguez*, it did so using the language of negative rights.²⁹ However, even as the Court failed to recognize a fundamental right, it simultaneously upheld existing precedent that recognized the government's special duty to provide public education.³⁰ Recognizing the fundamental duty to public education as a positive right would correct a major inconsistency in U.S. constitutional law and help bring fundamental rights doctrine more in line with broader understandings of social justice. In order to safeguard the fundamental right to public education, a new form of fundamental rights analysis for positive rights must be developed. The details of such a rights analysis will take time, but it must begin with an understanding that traditional strict scrutiny analysis cannot be applied to positive rights as they are to negative rights.

Part II discusses the development of fundamental rights under the U.S. Constitution. Part II ends with recognition that despite a comprehensive jurisprudence regarding individual liberties, there is a dearth of jurisprudence regarding constitutional duties owed to individuals, which are also known as positive rights. Part III examines the normative justifications for recognizing a fundamental duty to provide public education by examining the educational philosophies of such luminaries as Thomas Jefferson and John Dewey alongside today's international human rights laws.³¹ Part IV describes and criticizes the

27. Fundamental rights are unenumerated rights that the Supreme Court has recognized as so important and linked to U.S. historic traditions that they are accorded full protection under the U.S. Constitution. A fundamental duty refers to an obligation for the government to act, as opposed to freedom from government infringement.

28. See H.R.J. Res. 29, 112th Cong. (1st Sess. 2011); JESSE L. JACKSON JR. & FRANK E. WATKINS, A MORE PERFECT UNION ADVANCING NEW AMERICAN RIGHTS 329-49 (1st ed. 2001).

29. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973).

30. See *id.* at 29-30.

31. See EDUCATION IN THE UNITED STATES: A DOCUMENTARY HISTORY 739-40 (Sol Cohen ed., 1974) [hereinafter EDUCATION IN THE UNITED STATES]; JOHN DEWEY, DEMOCRACY AND EDUCATION 4 (1916); U.N. Charter pmbl., paras. 2, 4 (describing the duty of the state to promote its citizens' higher standards of living and fundamental freedoms); Universal Declaration of Human Rights G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec.

current doctrine regarding the right to public education as inconsistent with the aspirational holding of *Brown v. Board of Education*.³² It builds from Justice Marshall's *Rodriguez* dissent and includes a critique of the Court's use of federalism, race neutrality, and exposes the Court's reluctance to recognize positive rights and duties.³³ Part V discusses possible approaches to judicially enforcing a right to public education. It explores the limits of current fundamental rights doctrines that are based in negative rather than positive rights and the resulting need to develop a new form of rights analysis that applies in the context of fundamental duties owed to individuals.

II. FUNDAMENTAL RIGHTS AND THE CONSTITUTION

Fundamental rights as a term is relatively new,³⁴ but the concept has been developing ever since the 1868 passage of the Fourteenth Amendment with its guarantees of equal protection under the law as well as its protections of the privileges and immunities of citizenship.³⁵ The U.S. Supreme Court is most comfortable in recognizing negative rights, which are liberties or zones of protection from government action. However, the Court has struggled with how to recognize positive rights or duties, which represent obligations of the government to act.

Lochner Era economic substantive due process inspired the

12, 1948) (U.N. non-binding resolution declaring, among other things, that the right to public education is a human right).

32. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

33. *Rodriguez*, 411 U.S. at 70 (Marshall, J., dissenting).

34. *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (the first usage of the term, *fundamental rights*, by the U.S. Supreme Court); see *Henne v. Wright*, 904 F.2d 1208, 1214 (8th Cir. 1990) (listing line of Supreme Court cases establishing fundamental rights in which *Meyer* is the earliest case).

35. As stated in the Fourteenth Amendment:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1; *Slaughterhouse Cases*, 83 U.S. (16 Wall) 36 (1872) ("The *Slaughterhouse Cases* are a consolidation of the following cases: *Butchers' Benevolent Association of New Orleans v. Crescent City Live-Stock Landing and Slaughter-House Company*; *Paul Esteben, L. Ruch, J.P. Rouede, W. Maylie, S. Firmberg, B. Beaubay, William Fagan, J.D. Broderick, N. Seibel, M. Lannes, J. Gitzinger, J.P. Aycock, D. Verges, Live-Stock Dealers' and Butchers' Association of New Orleans, and Charles Cavaroc v. State of Louisiana, ex rel. S. Belden, Attorney-General*") ("[t]he fundamental rights, privileges, and immunities which belong to him as a free man and a free citizen, now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any State.").

transition in American jurisprudential thought toward seriously protecting the individual liberties that are recognized today as fundamental rights. Under the current fundamental rights doctrine, the significance of declaring a right to be fundamental is that any governmental infringement on a fundamental right triggers strict scrutiny.³⁶ If public education were declared a fundamental right, then under the current doctrine, any law infringing the right would trigger this strict scrutiny. Unfortunately, strict scrutiny is a liberty-centered approach that does not address the duties of the government. This analysis does not require that certain laws be passed, only that those laws that are passed do not infringe the right. The current liberty-centered fundamental rights analysis would not directly address the goal of creating a *duty* for the government to provide education that goes beyond a protection from infringement on a negative right.

A. Defining Fundamental Rights

Fundamental rights are not explicitly stated in the text of the Constitution, but they are defined as unenumerated rights that are so important that they are nonetheless recognized as being of equal stature to enumerated rights. The definition of a fundamental right is inexact and therefore leaves many with concerns that members of the Court will unjustifiably expand the scope of protected fundamental rights, and in so doing, overstep their appropriate judicial roles.³⁷

Today, fundamental rights are defined as those rights that are so rooted in the nation's history and traditions that the Supreme Court

36. See CHEMERINSKY, *supra* note 17, at 241. Strict scrutiny requires that the discriminatory behavior must satisfy a compelling interest in order to be justified. In another line of cases, the Supreme Court recognized certain fundamental rights under the Equal Protection Clause. See, e.g., *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668 (1966) (recognizing voting as a fundamental right); *Douglas v. California*, 372 U.S. 353, 357 (1963) (asserting that counsel must be made available on first criminal appeal); *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (declaring a right to trial transcripts on criminal appeal); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (ruling that there is a right to procreate). The Court declined, however, to extend this strand of equal protection doctrine to positive entitlements such as welfare, housing, and education. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973) (denying to extend a strict level of scrutiny of the equal protection doctrine to education); *Dandridge v. Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (denying the extension to housing); *Williams*, 397 U.S. 471, 485 (1970) (denying the extension to welfare).

37. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980); see ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (Indianapolis, Bobbs-Merrill 1962); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 205 (1980); see also LAURENCE TRIBE & MICHAEL DORF, *ON READING THE CONSTITUTION* (1991).

recognizes them as fundamental.³⁸ The right to public education easily fits within the expansive definition of a fundamental right being rooted in the nation's history and traditions.³⁹ However, this has been rejected, in part because of broader constitutional concerns about the Court possibly overstepping its proper judicial role and inappropriately constraining legislative actions.

The doctrine regarding non-textual fundamental rights has raised concerns about the Court's power as an unelected body to set constitutional limits and guarantees that are not explicitly stated within the Constitution's text.⁴⁰ The continuing debate regarding appropriate methods of constitutional construction is sometimes characterized as a debate about the appropriateness of various originalist and non-originalist approaches.⁴¹

Concerns regarding the powers of an unelected body to constrain and even overturn the will of a democratically elected majority are central to the contemporary calls for judicial restraint.⁴² Today's fears of judicial activism are born from very different circumstances than the modern day *liberal, activist judge* label implies.

Judicial restraint-based arguments have been generally applied to limit the expansion of fundamental rights, and they have been specifically applied in the context of public education.⁴³ Ironically, the root of such concern comes, not from excessive expansions of individual rights, but rather from a period when the Court expanded economic rights to the detriment of individual rights.⁴⁴ A duty to provide a public education is very different from the types of rights the Court was protecting in its controversial, pro-business *Lochner* Era

38. Derek Black, *Unlocking The Power of State Constitutions With Equal Protection: The First Step Toward Education as a Federally Protected Right*, 51 WM. & MARY L. REV. 1343, 1409-10 (2006); see *id.*; *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 195-97 (1989) (noting that the purpose of the due process clause was to protect the people from the State and not to ensure that the State protected them from each other); see also *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) ("[T]he Constitution is a charter of negative rather than positive liberties").

39. See *infra* Part III.

40. See ELY, *supra* note 37; BICKEL, *supra* note 37; Brest, *supra* note 37, at 205; TRIBE & DORF, *supra* note 37.

41. See ELY, *supra* note 37; BICKEL, *supra* note 37; Brest, *supra* note 37, at 205; TRIBE & DORF, *supra* note 37.

42. See ELY, *supra* note 37; BICKEL, *supra* note 37; Brest, *supra* note 37, at 205; TRIBE & DORF, *supra* note 37.

43. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 43 (1973) (discussing the need for judicial restraint).

44. See also *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (invalidating minimum wage law as exceeding scope of Congress's power); *Slaughterhouse Cases*, 83 U.S. 36, 78-83 (1872) (limiting the application of the Fourteenth Amendment, compare with *Lochner v. New York*, 198 U.S. 45, 56 (1905) (upholding "liberty of contract"))).

jurisprudence.⁴⁵ In fact, the imposition of duties were precisely what the Court sought to forbid during that period.⁴⁶ Yet the activism critiques of the *Lochner* Era's so-called *economic liberties* are today used to thwart progress in developing doctrines regarding governmental duties.

Substantive due process, under the due process clause of the Fourteenth Amendment, is viewed as the precursor to today's fundamental rights doctrine. Substantive due process developed during the period between 1887 to 1937, which is frequently described as the *Lochner* Era in American jurisprudential history.⁴⁷ This period saw a *conservative* U.S. Supreme Court strike down more legislation as unconstitutional than had ever been so declared in the first 100 years of U.S. history.⁴⁸

The conservative *Lochner* Era Court expanded Fourteenth Amendment protections to business relations in the form of economic rights, while simultaneously and dramatically limiting many of the individual rights protections that were plainly written into the text of the Fourteenth Amendment.⁴⁹ Using the Fifth Amendment and the Fourteenth Amendment, the Court expanded the concept of due process during this period to require substantive reasons for depriving a person or business of their life, liberty, or property.⁵⁰ This doctrine accorded the Court broad and sweeping powers to thwart progressive legislation

45. See *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 617 (1936) (invalidating a state minimum wage law for women); *Hammer v. Dagenhart*, 247 U.S. 251, 276-77 (1918) (holding law that prohibits the transportation of goods interstate made by child labor unconstitutional).

46. See *Carter*, 298 U.S. at 278-317 (invalidating minimum wage law as exceeding scope of Congress's power); *Morehead*, 298 U.S. at 617 (invalidating a state minimum wage law for women); *Hammer*, 247 U.S. at 276-77 (holding law that prohibits the transportation of goods interstate made by child labor unconstitutional); *United States v. E.C. Knight Co.*, 156 U.S. 1, 16-18 (1895) (holding that a sugar monopoly was legal because the constitution does not allow Congress to regulate manufacturing).

47. The *Lochner* Era takes its name from *Lochner v. New York*. The infamous *Lochner* case applied the laissez-faire economic theory of the era to specifically overturn minimum wage and hour laws regulating New York bakers.

48. See CHEMERINSKY, *supra* note 17; Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CAL. L. REV. 751, 754 n.19 (2009).

49. See CHEMERINSKY, *supra* note 17; *Slaughterhouse Cases*, 83 U.S. 36, 38 (limiting the application of the Fourteenth Amendment and its application). Cf. *Lochner v. New York*, 198 U.S. 45, 68 (1905) (upholding "liberty of contract"); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (invalidating minimum wage law as exceeding scope of Congress's power).

50. Economic Substantive due process is "[t]he doctrine that certain social policies, such as the freedom of contract or the right to enjoy property without interference by government regulation, exist in the Due Process Clause of the 14th Amendment, particularly in the words 'liberty' and 'property.'" BLACK'S LAW DICTIONARY 539 (9th ed. 2009); Nourse, *supra* note 48, at 751-53; see also *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

passed by federal and state governments.⁵¹ However, in the context of individual rights, the Court continued to find that there were no such constitutional protections. Protecting workers from deplorable working conditions and racist hiring practices was seen as beyond the scope of the federal government's powers under the Thirteenth Amendment and the Fourteenth Amendment powers.⁵² This continued even as the doctrine of economic substantive due process was expanded to further protect business and commerce.

The *Lochner* Era drew to a close with the recognition that the activist, conservative justices were overstepping their judicial role, and in so doing, undermining the Court's institutional legitimacy by functioning as a *super-legislature*.⁵³ President Roosevelt's famous *court-packing plan* was a significant manifestation of the popular resentment and distrust that the Court's illegitimate rulings engendered.⁵⁴ The *Lochner* Era's legacy is a continuing concern regarding activist judges unjustly and improperly thwarting the will of the majority by misapplying and expanding rights.

The conservative, economic substantive due process doctrine of the *Lochner* Era was largely repudiated by the end of the period.⁵⁵ However, this anti-progressive doctrine formed a foundation for circumventing problematic Fourteenth Amendment jurisprudence in order to advance the individual rights protections that are more consistent with the Fourteenth Amendment.⁵⁶ *Carolene Products*

51. *Carter*, 298 U.S. at 278-317 (invalidating minimum wage law as exceeding scope of Congress's power); *Morehead*, 298 U.S. at 617 (invalidating a state minimum wage law for women); *Hammer*, 247 U.S. at 268-77 (holding law preventing the transportation of goods interstate made by child labor unconstitutional); *E.C. Knight Co.*, 156 U.S. at 16-18 (finding a sugar monopoly legal because the Constitution does not allow Congress to regulate manufacturing).

52. U.S. CONST. amend. XIII (1865); U.S. CONST. amend. XIV (1868); *Slaughterhouse Cases*, 83 U.S. 36 (limiting the application of the Fourteenth Amendment and its application); *Civil Rights Cases*, 109 U.S. 3 (1883) (holding Congress's ability to use its power under the Reconstruction Amendments to end slavery, not to regulate private conduct).

53. See BICKEL, *supra* note 37; John Hart Ely, *Democracy and Distrust* (1980); TRIIBE & DORF, *supra* note 37; Brest, *supra* note 37, at 205.

54. See BURT SOLOMON, *FDR V. THE CONSTITUTION: THE COURT-PACKING FIGHT AND THE TRIUMPH OF DEMOCRACY* (1st ed. 2009). The court packing plan was as a legislative initiative to add more justices to the Supreme Court by President Franklin Roosevelt to obtain favorable rulings concerning portions of the New Deal that were previously ruled unconstitutional. David S. Law, *How to Rig the Federal Courts*, GEO. L.J. 779, 787 (2011).

55. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392 (1937); *Nebbia v. New York*, 291 U.S. 502, 539 (1934).

56. See Robin West, *Rights Harms and Duties: A Response to Justice for Hedgehogs*, 90 B.U. L. REV. 819, 831-33 (2010); Kermit Roosevelt III, *Forget The Fundamentals: Fixing Substantive Due Process*, 8 U. PA. J. CONST. L. 983, 1000-04 (2006); Joshua Herman, *Death Denies Due Process: Evaluating Due Process Challenges To The Federal Death Penalty Act*, 53 DEPAUL L. REV. 1777, 1832 (2004); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4

footnote four, often regarded as the most important footnote in American law, notably renounced the economic substantive due process doctrine, while simultaneously acknowledging the possibility of applying an analogous doctrine to protect “discrete and insular minorities.”⁵⁷ Later cases took this insight and applied it to develop the modern doctrines of equal protection and fundamental rights.⁵⁸

B. *The New Deal Era and Neo-Lochner Era*

During Roosevelt’s New Deal, social welfare legislation was successfully passed, created entitlements.⁵⁹ These entitlements were significant because they statutorily mandated and defined positive duties that the federal government owed to the people. Prior to the New Deal, the federal government was rarely thought to have these sorts of duties.⁶⁰ The federal role was seen as limited to the most basic notions of protecting the national welfare and not interfering with private individuals.⁶¹ The New Deal legislation invested Americans with the first meaningful set of positive rights owed to them by the federal government.⁶²

Positive rights and duties are in some ways the opposite of the negative rights or liberties that the Court has been more comfortable recognizing. Positive rights are obligations that the government owes the people.⁶³ Positive rights represent duties to act as opposed to

(1938).

57. *Carolene Prods. Co.*, 304 U.S. at 153 n.4.

58. See CHEMERINSKY, *supra* note 17, at 624; see also *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (finding that a state law prohibiting the use and distribution of contraceptives is unconstitutional); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding that the doctrine of “separate but equal” has no place in the field of public education, since separate educational facilities are inherently unequal).

59. Social Security Act, 49 Stat. 620 (1935) (Social Security Act, 42 U.S.C. § 7 (1965)); see ANDRE ACHENBAUM, *SOCIAL SECURITY VISIONS AND REVISIONS* (1986); http://www.fdrheritage.org/new_deal.htm; Franklin D. Roosevelt American Heritage Center Museum, New Deal Achievements, available at http://www.fdrheritage.org/new_deal.htm.

60. BASIL RAUCH, *THE HISTORY OF THE NEW DEAL*, Preface (Capricorn Books 1963) (1944); Roger I. Roots, *Government by Permanent Emergency: The Forgotten History of the New Deal Constitution*, 33 SUFFOLK U. L. REV. 259, 266 (2000); see Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 407-12 (2007).

61. *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (holding the law that prevented the transportation of goods interstate made by child labor unconstitutional); see generally Charles O. Jackson, *Food and Drug Legislation in the New Deal* (Princeton University Press 1970); Don Lawson, *FDR’s New Deal* (1st ed. 1979).

62. See generally CHARLES O. JACKSON, *FOOD AND DRUG LEGISLATION IN THE NEW DEAL* (Princeton University Press 1970); DON LAWSON, *FDR’S NEW DEAL* (1st ed. 1979).

63. See generally RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* (2002); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978); see also Helen

negative rights, which are defined as limitations on how far government can act.⁶⁴ To recognize a right to public education would require the government to fulfill a duty.⁶⁵ The Fourteenth Amendment's privileges or immunities clause was effectively read out of existence for so long, in large part, because of a deeply entrenched discomfort with positive rights.⁶⁶

The New Deal Era's expansion of federal government duties continued well past the time of Roosevelt and continues today. Today, Social Security, Medicare, Medicaid, and other social welfare programs are treated as statutory rights or duties that, while not constitutionally mandated, are nonetheless legally binding obligations of the federal government.⁶⁷ Later efforts, such as the Individuals with Disabilities Education Act (IDEA), the Elementary and Secondary Education Act (ESEA), and the more recent amendments to ESEA in the No Child Left Behind Act (NCLB) fit within the New Deal Era's framework of the statutory expansion of the government's duty to provide public education.⁶⁸

Hershkoff, "JUST WORDS": *Common Law and the Enforcement of State Constitutional Social and Economic Rights*, 62 STAN. L. REV. 1521, 1540 (2010); Curt Bentley, *Constrained by the Liberal Tradition: Why the Supreme Court Has Not Found Positive Rights in the American Constitution*, 2007 BYU L. REV. 1721, 1733-34 (2007); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1315 (1984).

64. See Hershkoff, *supra* note 63, at 1520, 1533-34, 1554; Bentley, *supra* note 63, at 1721, 1765 n.2; Kreimer, *supra* note 63, 1325-26; DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY, *supra* note 63, at 120; DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 63, at 266-67.

65. See Hershkoff, *supra* note 63, at 1520, 1533-34, 1554; Bentley, *supra* note 63, at 1721, 1765 n.2; Kreimer, *supra* note 63, 1325-26; DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY, *supra* note 63, at 120; DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 63, at 266-67.

66. *Slaughterhouse Cases*, 83 U.S. 36, 59 (1873) (limiting the application of the Fourteenth Amendment); *Civil Rights Cases*, 109 U.S. 3, 23-26 (1883) (holding that Congress has the ability to use its power under the Reconstruction Amendments to end slavery, not to regulate private conduct). In the context of the privileges and immunities clause jurisprudence, the *Slaughterhouse Cases* effectively read out of existence the privileges of citizenship until the 1999 case of *Saenz v. Roe*. *Saenz v. Roe*, 526 U.S. 489, 501-02 (1999).

67. Patricia E. Dilley, *The Evolution of Entitlement: Retirement Income and the Problem of Integrating Private Pensions and Social Security*, 30 LOY. L.A. L. REV. 1063, 1077-78 (1997).

68. Individuals with Disabilities Education Act (IDEA), 118 Stat. 2647 (2004); Elementary and Secondary Education Act (ESEA), 79 Stat. 27 (1965); Wayne Batchis, *Urban Sprawl and the Constitution: Educational Inequality as an Impetus to Low Density Living*, 42 URB. LAW. 95, 95-96, 99-100, 103, 111-12 (2010); Derek Black, *Unlocking the Power of State Constitutions With Equal Protection: The First Step Toward Education as a Federally Protected Right*, 51 WM. & MARY L. REV. 1343, 1413-16 (2010); Timothy D. Lynch, Note, *Education as a Fundamental Right: Challenging the Supreme Court's Jurisprudence*, 26 HOFSTRA L. REV. 953, 954-57 (1998).

The manner in which the *Lochner* Era's liberty of contract doctrine thwarted progressive legislation regarding individual rights and governmental duties continues today. Economic libertarianism, as evidenced by such cases as *Citizens United*,⁶⁹ where almost seventy-three years later popular legislation that is meant to preserve and protect the rights of the least powerful is again declared unconstitutional based on its impact on businesses, who as *juridical people*, are once again accorded rights akin to *actual people*.⁷⁰ *Lochner* Era jurisprudence had to shift in order for the government to create and fulfill statutory rights and duties that helped bring an end to the Great Depression.⁷¹ Likewise, the modern era's libertarian perspective must now shift to recognize positive rights and duties as a constitutional imperative in order to exit the current economic downturn.⁷²

The *Lochner* Era, which ended in the midst of the Great Depression, saw the rise of legal doctrines that expanded the rights of business and commerce by way of the Fourteenth Amendment.⁷³ The *Lochner* Era also saw the continued narrowing of constitutionally guaranteed protections and rights that were guaranteed by the Fourteenth Amendment.⁷⁴

Today, we stand in the midst of what has been described as the greatest economic collapse since the Great Depression.⁷⁵ Much like the

69. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 885-86 (2010).

70. *Id.* (finding that under the First Amendment, corporate funding of independent political broadcasts in candidate elections cannot be limited).

71. WILLIAM E. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL* (Harper & Row 1963); ELLIOT A. ROSEN, *ROOSEVELT, THE GREAT DEPRESSION, AND THE ECONOMICS OF RECOVERY* (Univ. of Virginia Press 2005); ARTHUR SCHLESINGER JR., *THE COMING OF THE NEW DEAL* (Houghton Mifflin Company 1958).

72. See ROBERT REICH, *AFTERSHOCK: THE ECONOMY AND AMERICA'S FUTURE* (2010).

73. The *Lochner* Era takes its name from *Lochner v. New York*, which clearly demonstrated the legal theory, economic, and social beliefs of the Court and how those beliefs were applied. *Lochner v. New York*, 198 U.S. 45 (1905).

74. See Scott Dodson, *A Darwinist View of the Living Constitution*, 61 VAND. L. REV. 1319, 1338-39 (2008) ("[t]he Commerce Clause has [shifted] from modestly broad under the Marshall Court to rather narrow in the *Lochner* era"); Christopher J. Roederer, *Democracy and Tort Law in America: The Counter-Revolution*, 110 W. VA. L. REV. 647, 655 (2008).

The Supreme Court has limited Congress's ability to address national problems to a degree only matched by the *Lochner* Court's interference with attempts by Congress and the President to respond to the Great Depression. This includes: restricting the constitutional power of Congress to regulate interstate commerce and to enforce the guarantees of the Fourteenth Amendment; expanding state immunity from federally defined claims of unfair labor practices and discrimination.

Id.

75. See *Wylie v. Waste Mgmt., Inc.*, No. 09 CV 04542, slip op. at 5 (N.D. Ill. July 21,

prelude to the Great Depression, which was preceded by the *Lochner* Era, the current economic collapse that began in 2008 was preceded by a period of rights expansion for business and commerce. Both the *Lochner* and Reagan eras saw an expansion of business rights during a simultaneous narrowing of civil rights protections for individuals.⁷⁶ Reagan Era business deregulation, rights expansion, and subsequent economic collapse harkens back to *Lochner* Era business rights expansion and the Great Depression.⁷⁷ The Great Depression inspired a national reassessment of business rights versus civil rights and human rights.⁷⁸ Likewise, the current economic collapse ought to motivate a similar national reassessment of what rights ought to be.

The *Lochner* Era ended with the New Deal Era, which saw the creation of new statutory rights and duties. The conservative period that led up to the current economic collapse ought to inspire a similar reassessment of rights that sees the recognition of expanded constitutional rights and duties, including the constitutional duty to provide public education.

III. NORMATIVE ARGUMENTS FOR A RIGHT TO PUBLIC EDUCATION

Thomas Jefferson and his fellow founding fathers wrote official declarations and papers that espoused a civic philosophy that public education is essential to a democracy.⁷⁹ They espoused normative arguments favoring public education that have continued to be articulated by more contemporary educational philosophers like John Dewey.⁸⁰ Moving beyond the realm of American educational philosophy, international human rights conventions and treaties also present normative justifications for public education as an international

2010) (explaining that homeowners throughout the United States have experienced a dramatic decrease in the value of their homes due to the most serious lending and economic crisis facing the nation since the Great Depression); Alan Devlin, *Antitrust in an Era of Market Failure*, 333 HARV. J.L. & PUB. POL'Y 557, 582 (2010) ("[t]he 2008 economic crisis [was] the worst since the Great Depression").

76. Risa L. Goluboff, *The Lost Promise of Civil Rights*, 93 VA. L. REV. In Brief 85, 96 (2007) ("African Americans' enjoyment of contract and property rights had been central to Reconstruction-era ideas of civil rights, but during the *Lochner* era the Court largely divorced due process rights from those of African Americans").

77. *Id.* ("African Americans' enjoyment of contract and property rights had been central to Reconstruction-era ideas of civil rights, but during the *Lochner* era the Court largely divorced due process rights from those of African Americans").

78. See CHEMERINSKY, *supra* note 17, at 624 (quoting Geoffrey Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397); *United States v. Carolene Products Co.*, 304 U.S. 141 n.4 (1938).

79. See EDUCATION IN THE UNITED STATES, *supra* note 31; DEWEY, *supra* note 31.

80. See DEWEY, *supra* note 31.

human right.⁸¹ This indicates strong foundational support for the right to public education as well as an obligation under international law to fulfill the basic human right to public education.

A. Philosophical and Historical Support for the Right to Education

The founders of America were supporters of free public education and during their time sponsored initiatives to further public education.⁸² Thomas Jefferson's several writings on the subject of public education⁸³ and his Virginia "Bill for the General Diffusion of Knowledge"⁸⁴ of 1779 demonstrate his educational philosophy.⁸⁵ Jefferson championed, in his 1779 bill, public funding for building schools and guaranteed all free children three years of free, public education.⁸⁶ The purpose of the bill was to teach all children reading, writing, and arithmetic. Jefferson's educational philosophy was somewhat conservative relative to today's standards, given his belief in a "natural aristocracy amongst

81. See, e.g., Ann Fagan Ginger, *What is the U.S. Constitution Today*, 9 J.L. & SOC. CHALLENGES 107, 112 (2008).

The United States agreed to "promote" throughout the United States and its territories: "high standards of living and full employment," specifically mentioning health, culture, and education . . . [t]here are human rights not mentioned in the Bill of Rights or Reconstruction Amendments, but since the Great Depression, more and more Americans include them in the phrase "human rights."

Id. According to the Ginger, "All are mentioned in the U.N. Charter art. 55. They are spelled out in the International Covenant on Civil and Political Rights." *Id.* n.42.

82. Benjamin Rush, *Of the Mode of Education Proper in a Republic*, in *ESSAYS, LITERARY, MORAL, AND PHILOSOPHICAL* 8-13 (1806), reprinted in *EDUCATION IN THE UNITED STATES*, *supra* note 31, at 758-60; Samuel Knox, *An Essay on the Best System of Liberal Education, Adapted to the Genius of the Government of the United States* (Baltimore, 1799), reprinted in *EDUCATION IN THE UNITED STATES*, *supra* note 31, at 776-80; see Thomas Jefferson, *Bill for the More General Diffusion of Knowledge*, in *The Works of Thomas Jefferson* vol. 2, at 414-26 (Paul L. Ford ed., 1904), reprinted in *EDUCATION IN THE UNITED STATES*, *supra* note 31, at 739-44.

83. See, e.g., Thomas Jefferson, *A Bill for Amending the Constitution of William and Mary, and Substituting More Certain Revenues for Its Support* (1779), in *Sundry Documents on the Subject of a System of Public Education for the State of Virginia*, 56-60 (1817), reprinted in *EDUCATION IN THE UNITED STATES*, *supra* note 31, at 745-47; Thomas Jefferson, *From Thomas Jefferson to George Wythe* (Aug. 13, 1786), in *the Papers of Thomas Jefferson* 243-45 (1954), reprinted in *EDUCATION IN THE UNITED STATES*, *supra* note 31, at 750-51; Thomas Jefferson, *Notes on the State of Virginia, with an appendix*, 202-03 (1801), reprinted in *EDUCATION IN THE UNITED STATES*, *supra* note 31, at 747-51.

84. Jefferson, *supra* 82, at 739-44.

85. A Virginia bill, sponsored by Thomas Jefferson, called for a school system subsidized by the state. Jefferson, *supra* note 82, at 739-44.

86. *Id.* at 740-41.

men.”⁸⁷ The bill called for localized funding and maintenance of the schools, and Jefferson’s bill provided for the continued education of children of superior ability whose parents lacked the funds to pay for education beyond the three free years.⁸⁸ The rationale behind this provision was that children should not be deprived of an education simply because they come from poor families.⁸⁹ Jefferson believed that society had a duty to educate children who could not afford education but had a demonstrated superior intellectual ability.⁹⁰ Jefferson indicated a need for broad public involvement in funding public education.⁹¹ Samuel Knox’s call regarding education was, by comparison, even broader, as he explicitly called for the broadest form of public involvement in education.⁹²

Samuel Knox’s 1799 writing, “An Essay on the Best System of Liberal Education Adapted to the Genius of the Government of the United States” was perhaps the earliest call for a *national* system of education in America.⁹³ Knox, a republican thinker, made his call for a national system of education while making reference to the historical and illustrious characters of ancient antiquity such as Cicero and other students of the academy in Athens.⁹⁴ Knox describes the historic superiority of public education over private education.⁹⁵ Knox recognized that given the size of the United States, it would be difficult to establish a system capable of affording education equally to every individual in the nation.⁹⁶ He analogized those difficulties with difficulties in forming a national government and concluded that such difficulties ought not detract from the goal of a national education system.⁹⁷ “It does not appear more impracticable to establish an uniform system of national education, than a system of legislation or civil government.”⁹⁸ This quote offers an important insight into the way

87. Thomas Jefferson, Letter from Thomas Jefferson to John Adams (Oct. 28, 1813), in *The Writings of Thomas Jefferson* Vol. XII 394-403 (Albert E. Bergh ed., 1905), reprinted in *EDUCATION IN THE UNITED STATES*, *supra* note 31, at 753.

88. Thomas Jefferson, *Bill for the More General Diffusion of Knowledge* (1779), reprinted in *EDUCATION IN THE UNITED STATES*, *supra* note 31, at 740-41, 744.

89. *Id.* at 740.

90. *Id.* at 391.

91. *Id.* at 740-41.

92. See generally Samuel Knox, *An Essay on the Best System of Liberal Education Adapted to the Genius of the Government of the United States* (Baltimore, 1799) (advocating for a broad system of national education).

93. See *EDUCATION IN THE UNITED STATES*, *supra* note 31, at 391. See generally *id.* (making the plea in 1799 for national system of government).

94. Knox, *supra* note 92.

95. *Id.*

96. *Id.* at 69.

97. *Id.*

98. See *EDUCATION IN THE UNITED STATES*, *supra* note 31, at 391 (citing Thomas

educational systems were originally organized. Although Knox's proposal was never formally enacted, his approach of paralleling the structure of educational systems to that of civil governments was incorporated in Jefferson's bill.⁹⁹

These early luminaries were all republicans. This means that they shared what was then a liberal insight. Their ideology of local control and weak national government sprang from a desire to protect the interests of the poor and politically powerless. Under this republican model, they believed the government could best encourage the education of all capable citizens, thereby accomplishing the fulfillment of a liberal vision of education that, at the time, was not underway or even being considered in Europe.¹⁰⁰ The modern-day educational system of school districts and local control can be traced back to these early thinkers, whose motivation was to provide public education in a manner that they thought would best assure widespread public education.

Under the more contemporary philosophy of John Dewey, the ultimate aim of society ought not be the mere production of goods, but the production of free human beings associated with one another on terms of equality.¹⁰¹ Formal education has become increasingly important as the scope of resources, achievements, and responsibilities in society has grown more complex.¹⁰² No longer can children get by with a mere three years of formal basic education and from there go on to apprentice themselves to adults. The apprenticing that was the primary means of education in the days of Jefferson and Knox is no longer a viable means of successfully educating citizens for life in today's vastly more complex and intellectually demanding society.

Education is a necessity of life for Dewey because "what nutrition and reproduction are to physiological life, education is to social life"—a means of sustaining and perpetuating that which makes us human.¹⁰³ Democracy and education are linked because a democratic community is a form of social life where external authority is repudiated in favor of

Jefferson, *Bill for the More General Diffusion of Knowledge* (1779)).

99. *Id.* at 740-41.

100. *Id.* at 739-40.

101. See DEWEY, *supra* note 31.

102. See *id.* at 8.

103.

[B]asic human needs . . . refer to the fundamental requirements of food, shelter, medical care, and education. Although education may not intuitively seem necessary to the sustenance of life, the concept of "basic needs," as applied in development literature, commonly includes education as one of the five basic needs of human beings.

See *id.* at 9; see also Park, *supra* note 3, at 1264 n.1.

voluntary, interested deliberation.¹⁰⁴ In order to have an all-encompassing, interested deliberation, society needs a well-educated citizenry.

Dewey's philosophy is not limited to mere political socialization, for he appreciated the human need to live and function as a fulfilled and contributing member of society.¹⁰⁵ Recognizing that there is more to the state's role in providing education than simply preparing its young citizens to govern demonstrates an underlying belief in a positive view of the purpose of the state.¹⁰⁶ The state's purpose is not only to safeguard liberty, but also to provide the background opportunity by which individuals may fully develop their capabilities.¹⁰⁷

In sum, American scholars and leaders have historically treated education as though it were an individual right. This is a vision that America has carried into the international arena as part of a broader understanding of international human rights.

B. International Human Rights Conventions

Several U.N. Conventions, including the U.N. Charter, to which the United States is a party, describe the state's duty to promote higher standards of living and other fundamental freedoms necessary for the security of human rights and fundamental freedoms.¹⁰⁸ The U.N. Charter espouses the broad goals of the United Nations, and depends upon later provisions, conventions, and treaties to bring full meaning to its general call for states to recognize and protect human rights.¹⁰⁹ One such convention is the Universal Declaration of Human Rights, of which the United States is a party.¹¹⁰ Article 26 of the Universal Declaration describes the right to public education as a human right.¹¹¹

U.S. courts ought to recognize the Universal Declaration of Human Rights as binding, both because the Universal Declaration has been ratified by the United States¹¹² and because it is widely viewed to have now attained the status of customary international law.¹¹³ Given that international treaties are on the same level as federal statutes on the domestic hierarchy of laws,¹¹⁴ the fact that the United States is a party

104. See DEWEY, *supra* note 31, at 87.

105. See generally *id.*

106. See *id.* at 183.

107. See *id.*

108. U.N. Charter, art. 55.

109. *Id.*

110. Universal Declaration of Human Rights, art. 26.

111. *Id.*

112. *Id.*

113. *Id.*; see *Filartiga v. Pena-Irala*, 630 F.2d 876, 879 (2d Cir. 1980).

114. U.S. CONST. art. VI, cl. 2.

to this Convention serves as more than a normative justification for the right, but describes its actual existence under federal law.¹¹⁵

The *Paquete Habana* case of 1900 is the foundation for the domestic recognition of international law and stands for the proposition that ratified treaties are binding upon U.S. courts.¹¹⁶ In fact, the West Virginia Supreme Court has held that education is a fundamental right under its state constitution, and based part of its reasoning on a reading of the Universal Declaration of Human Rights.¹¹⁷

Other authority for a right to public education under international law is the International Covenant on Economic, Social, and Cultural Rights,¹¹⁸ which recognizes a right to public education.¹¹⁹ The United States is a signatory, but has not yet ratified this covenant.¹²⁰ The United States is also a party to the Charter of the Organization of American States,¹²¹ which, among other things, recognizes a right to

115. *Id.*

116. See *id.*; Genc Trnavci, *The Meaning and Scope of the Law of Nations in the Context of the Alien Tort Claims Act and International Law*, 26 U. PA. J. INT'L ECON. L. 193, 237 (2005):

In recent times, lower courts have been unanimous in holding that federal common law incorporates customary international law. In the most important case to date involving the interpretation of the ATCA, *Filartiga v. Pena Irala* (1980), the Court concluded that, “[f]or the purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of mankind.” The court in *Filartiga* analyzed the abovementioned the Supreme Court decisions in *Paqueta Habana* and *Erie* and established four distinctive features of the law of nations under § 1350:

1. The law of nations is part of the federal common law, and thus cases arising under the law of nations also arise under the laws of the United States as required by Article III of the Constitution;
2. The law of nations “may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law;”
3. the law of nations must “command the general assent of civilized nations” to be part of the law of nations and “it is only where the nations of the work have demonstrated that a wrong is of mutual, and not merely several, concern by means of express international law violation within the meaning of the statute.”
4. The law of nations must be interpreted “not as it was in 1789, but as it has evolved and exists among the nations of the world today.”

117. See *Pauley v. Kelly*, 255 S.E.2d 859, 863 n.5, 878 (W.Va. 1979).

118. International Covenant on Economic, Social, and Cultural Rights, art. 13, Dec. 16, 1966, 993 U.N.T.S. 3, available at <http://www2.ohchr.org/english/law/cescr.htm> [hereinafter ICESCR].

119. *Id.*

120. *Park*, *supra* note 3, at 1221.

121. *Id.* at 1226 n.113.

public education.¹²²

The significance of the United States being a signatory or a full party to international treaties that proclaim a right to public education is two-fold. First, as previously mentioned, ratification of such treaties makes the right a part of federal law, which has the significance of creating a statutory, even if not a constitutional, right to public education that ought to trump state laws, pursuant to the Supremacy Clause of Article VI to the U.S. Constitution.¹²³

Second, the fact that the United States has entered into treaties and international agreements calling for international recognition and state protection of the right to public education is demonstrative of a national commitment to education as a human necessity that ought not be denied.¹²⁴ Entering into these treaties is a mechanism through which America spreads democratic and humanitarian value across the world. If the United States continues to be an advocate on the international stage for human rights, such as education, but leaves the protection of such rights to the local authority of individual states, America risks breaching its international commitments. Unfortunately, the U.S. Supreme Court has never held that any international human rights treaty automatically supersedes inconsistent domestic law.¹²⁵ A U.S. court has held that Article 47 of the amended Charter of the Organization of American States (OAS) does not impose an international obligation to provide public education.¹²⁶ One U.S. court summarized the United States in regard to the international right to public education by stating: "The right to education, while it represents an important international goal, has not acquired the status of customary international law."¹²⁷ This is an inaccurate summary of the current status of international law and further demonstrates the American bias against recognizing positive rights. The United States is a party to the above-mentioned conventions, yet it consistently falls short of providing a quality of public education sufficient to satisfy the basic educational needs of an increasingly complex society. This undermines our nation's international credibility as a champion of protecting this and other fundamental human rights.

122. "The Member States will exert the greatest efforts, in accordance with their constitutional processes, to ensure the effective exercise of the right to education. . . ." Organization of American States Charter, art. 49, *available at* http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States.htm [hereinafter O.A.S. Charter].

123. "This Constitution . . . and all Treaties made . . . under the authority of the United States, shall be the supreme Law of the Land. . . ." U.S. CONST. art. VI, cl. 2.

124. *See, e.g.*, Universal Declaration, *supra* note 110; ICESCR, *supra* note 118; O.A.S. Charter, *supra* note 122, arts. 47, 49.

125. Douglas Donoho, *Human Rights Enforcement in the Twenty-First Century*, 35 GA. J. INT'L & COMP. L. 1 (2006).

126. *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976).

127. *In re Alien Children Education Litigation*, 501 F. Supp. 544 (S.D. Tex. 1980).

In sum, American scholars and leaders have historically treated education as though it were an individual right to be protected and promoted by the state. This American insight has also shown itself in U.S. foreign policy, as illustrated by the international convention, to which the United States is either a signatory or a full party. The Court paid homage to this tradition in *Brown v. Board of Education*,¹²⁸ where it recognized the importance of education, but fatally undermined this recognition later in *Rodriguez*.¹²⁹

IV. CRITIQUES OF THE DOCTRINE REGARDING PUBLIC EDUCATION

The seminal case of *Brown v. Board of Education* is fairly read as the culmination of the evolving education doctrine to finally recognize a right to public education.¹³⁰ In *Brown*, the Court recognized that as a matter of public policy, the systematic denial of quality education to minority children was unconstitutional given the importance of education to American democratic society.¹³¹ *Brown* explains that a denial of a quality education is tantamount to the denial of an individual's full citizenship rights.¹³² *Brown* explains that this is

128. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493-95 (1954) (holding public school segregation unconstitutional).

129. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18 (1973) (holding that there is no constitutional right to public education).

130. Given the general, consistent, and systematic relegation of inadequate resources, poorer facilities, and inferior services to nonwhites, school segregation was a subtle way of describing blatant disproportionate resource allocation. *See also* Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1059-61 (1978).

131. *Brown* was brought to afford children an equal opportunity to develop their capabilities:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities . . . [i]t is the very foundation of good citizenship. . . . [i]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

132. *See Rodriguez*, 411 U.S. 1, at 111 (Marshall, J., dissenting "[T]he fundamental importance of education is amply indicated by the prior decisions of this Court. . . . this Court's most famous statement on the subject is that contained in *Brown v. Board of Education*"); *see* Enid Trucios-Haynes & Cedric Merlin Powell, *The Rhetoric of Colorblind Constitutionalism: Individualism, Race and Public Schools in Louisville, Kentucky*, 112 PENN. ST. L. REV. 947, 970 (2008).

because an individual's ability to effectively exercise their First Amendment freedoms and thereby fully engage in democratic deliberation on equal grounds is necessarily dependent upon the quality of education the individual attains.¹³³ Desegregation was but a means to an ultimate end: Equal opportunity to attend public schools of sufficiently high quality to allow students to fully participate in society.¹³⁴

The hopes and possibilities that *Brown* engendered were abandoned in *San Antonio v. Rodriguez*,¹³⁵ which held that there is no fundamental right to public education.¹³⁶ *Rodriguez* was brought on behalf of Mexican-American schoolchildren living in an area adversely affected by a Texas school funding formula.¹³⁷ The suit challenged the funding formula for not allocating sufficient funds to the predominantly minority school district.¹³⁸

In reaching its conclusion, the *Rodriguez* court ignored the earlier recognition that there is a racial dimension to the education debate and instead chose to conduct a narrow, race-neutral evaluation.¹³⁹ The *Rodriguez* court denied the existence of a fundamental right to public education by removing the crucial issue of race.¹⁴⁰ Once race was off the table, the Court was then able to redefine the right independent of its social importance and thereby narrow the scope of what rights would be deemed fundamental.¹⁴¹ The consequences of this shift in education

133. *Brown*, 347 U.S. 483, 493 (1954). See generally DEWEY, *supra* note 31, at 183; Henry L. Chambers Jr., *Colorblindness, Race Neutrality, and Voting Rights*, 51 EMORY L.J. 1397, 1411-12 (2002).

134. See generally Cedric Merlin Powell, *Schools, Rhetorical Neutrality, and the Failure of the Colorblind Equal Protection Clause*, 10 RUTGERS RACE & L. REV. 362 (2008).

135. *Rodriguez*, 411 U.S. at 58-59. See also Powell, *supra* note 134, at 371-73 (discussing the decline of the education rights doctrine espoused in *Brown v. Board of Education*).

136. *Rodriguez*, 411 U.S. at 37. In addition to the fundamental rights holding, the Court also found that the Texas school funding formula did not violate equal protection because it did not have a disparate impact on the plaintiffs. *Id.* at 40. See also KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 189-210, 267-85 (1989).

137. *Rodriguez*, 411 U.S. at 4-5.

138. *Id.*

139. See *id.* at 29, 30, 35.

140. The *Brown* and *Rodriguez* cases were both fundamentally about the denial of equal educational opportunity based on race. The difference is that in *Brown*, the Court accepted that African American children were denied an education. However, *Rodriguez* denied that race was a relevant factor, holding there was no necessary correlation between race, a community's taxable property value, and school financing. This was a peculiar holding, given that the case was brought by the families of Mexican-American school children, a group with a significant history of racial discrimination in the United States generally and in Texas specifically. See *Rodriguez*, 411 U.S. at 35; see Charles Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of "The Id, The Ego, and Equal Protection,"* 40 CONN. L. REV. 931, 955 (2008); see generally Powell, *supra* note 134, at 371-78.

141. Ostensibly, this is based on a concern that broadening the scope of what could be

rights doctrine are visible in subsequent cases, where the failure to apply strict scrutiny has made remedying educational inequality much more difficult.¹⁴²

This section critiques the current education rights doctrine by first examining the federalism arguments used to justify the *Rodriguez* retreat from education rights contentions, which flow from arguments that have been historically used to justify odious racial policies. Second, it examines the extent to which the future growth and success of the American economy and democracy continues to be linked to education.¹⁴³ Finally, the section reveals that the doctrine is flawed because the Court's confusion regarding fundamental rights has led to subsequent cases that broadly undermine social equality. Instead, the Court privileges the rights of those who are already privileged to attend quality schools over the individual rights of the under-privileged victims of segregated and underfunded education.¹⁴⁴

A. Federalism Arguments

Federalism is central to American democracy and also to the ongoing debate regarding the constitutional duty to provide public education.¹⁴⁵

One federalism argument is the states' rights argument, passively invoked by Justice Powell, which describes the states as having certain rights under the Constitution; arguing that expansion of federal powers with regard to education would undermine those rights.¹⁴⁶ A second

deemed to be fundamental rights would require the Court to characterize some activities as more important or fundamental than others, hence making the Court a super-legislature, similar in effect to the conservative *Lochner* Court. See *Rodriguez*, 411 U.S. at 30-31, 35. See generally BICKEL, *supra* note 37; ELY, *supra* note 37.

142. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 724-725 (2007); see *Milliken v. Bradley*, 418 U.S. 717, 741 (1974).

143. Myron Orfield, *Choice, Equal Protection, and Metropolitan Integration: The Hope of the Minneapolis Desegregation Settlement*, 24 LAW & INEQ. 269, 287-88 (2006) ("Black students who attend racially integrated and economically integrated schools complete more years of schooling than those who attend segregated schools.").

144. See also *Parents Involved*, 551 U.S. at 724-25 (2007); *Milliken v. Bradley*, 418 U.S. 717, 741 (1974); Freeman, *supra* note 130, at 1052-54. See generally Powell, *supra* note 134.

145. Compare *Paynter v. State*, 797 N.E.2d 1225, 1229-30 (N.Y. 2003) (discussing how education has, and should always remain in, local control), with *Derolph v. State*, 728 N.E.2d 993, 1025 (Ohio 2000) (arguing that too much local control has inequitable results in funding for school children).

146. *Rodriguez*, 411 U.S. at 39 (stating that "the Texas system . . . should be scrutinized under judicial principles sensitive to the nature of the State's efforts and to the rights reserved to the States under the Constitution . . . [l]ocal control is not only vital to continued public support of the school, but it is of overriding importance from an educational standpoint as well." *Id.* (internal citation omitted)).

federalism argument is that the federal government is too large to fully appreciate the educational issues important to diverse communities throughout the country and that states are better situated to effectuate the local community's goals and safeguard the individual's right to public education.¹⁴⁷ Both the states' rights and local control arguments are borne from the historical context of American slavery and segregation.

The local control and the states' rights arguments are traceable to a concept of federalism grounded in protecting the property of southern slave owners.¹⁴⁸ Southern delegates to the 1787 Constitutional Convention were very concerned about limiting the federal government's power to undermine their holdings in human property.¹⁴⁹ Charles Pickney, a Constitutional Convention delegate from South Carolina, spoke in support of the Constitution, saying:

We have a security that the general government can never emancipate them for no such authority is granted; and . . . the general government has no such power but what are expressly granted by the Constitution. . . . [W]e have made the best terms for the security of this species of property it was in our power to make.¹⁵⁰

McConkie concludes that, from the very beginning, principles of federalism were intertwined with efforts to subordinate racial minorities.¹⁵¹

Indeed, "[t]he most prominent battles regarding race, civil rights, and federalism have been in the arena of public education."¹⁵² Unfortunately, the Court has ruled since *Rodriguez* that education is an arena that is not primarily within the federal realm of protection. Instead, this doctrine falls under the rubric of state and local

147. *Rodriguez*, 411 U.S. at 44-49 (stating that "[q]uestions of federalism are always inherent in the process of determining whether a State's laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous judicial scrutiny . . . [i]t would be difficult to imagine a case having a greater potential impact on our federal system than the one before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every State . . . we continue to acknowledge that the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues . . . the Court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection Clause." *Rodriguez*, 411 U.S. at 44-48.

148. *Dred Scott v. Sandford*, 60 U.S. 393, 437 (1856) (arguing for state sovereignty).

149. See Pace Jefferson McConkie, *Civil Rights and Federalism Fights: Is there a "More Perfect Union" for the Heirs to the Promise of Brown?*, 1996 BYUL REV. 389, 391 (1996).

150. See *id.* at 391; see also THE RECORDS OF THE FEDERAL CONVENTION OF 1787, vol. 1, at 254-55 (Max Farrand ed. 1937).

151. McConkie, *supra* note 149, at 391.

152. *Rodriguez*, 411 U.S. at 71 (Marshall, J., dissenting).

government responsibilities.¹⁵³ While the states' rights argument that local control of school districts is of vital importance was successfully invoked in *Rodriguez*, it is also accepted that there is no constitutional right to local control of a school system that violates the students' civil rights and guarantees of equal protection.¹⁵⁴ A fundamental right to public education would recognize that, at some point, a state's failure to provide a quality education to a discrete group of its own children is unconstitutional and that federal courts ought to be required to remedy such situations.

The thrust of the federalism argument against strict scrutiny is that local control and state oversight of public schools is a deeply rooted American tradition.¹⁵⁵ The *Rodriguez* Court determined that the system of school financing in question was similar to systems of local, property tax-based school financing schemes that exist in most other states. Therefore, the Court held that local, property tax-based school finance systems are an inappropriate candidate for strict scrutiny.¹⁵⁶ A state's laws for funding education are therefore accorded deference, and federal courts will only apply the rational basis test, the weakest standard in equal protection analysis.¹⁵⁷ Under this test, as long as the state articulates some rationale for its action, the action will be deemed not unconstitutional, thus allowing gross inequities in education, such as those in *Rodriguez*, to continue to exist without any hope of a federal judicial remedy.¹⁵⁸ This logic implicitly places a higher value on a controversial tradition of local control than on society's real need for a well-educated citizenry.

1. States' Rights

The first federalism argument against public education is the states' rights arguments, which itself relies on an antiquated conception of federalism. States do not have rights in the same way that individuals have rights. The Constitution does not delineate in either the Ninth

153. *Horne v. Flores*, 129 S. Ct. 2579, 2607 (2009); *Freedman v. Pitts*, 503 U.S. 467, 489 (1992) (education is local in nature); see also *Paynter v. State*, 797 N.E.2d 1225, 1229 (N.Y. 2003).

154. *Toledo v. Sanchez*, 454 F.3d 24, 33 (1st Cir. 2006) (education is not a "right" granted to individuals by the Constitution; but neither is it "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation" (quoting *Plyler v. Doe*, 457 U.S. 203, 221 (2005))).

155. See *Rodriguez*, 411 U.S. at 44; *Milliken v. Bradley*, 418 U.S. 717, 741 (1974).

156. *Rodriguez*, 411 U.S. at 44.

157. *Id.* ("It would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every State").

158. See *id.*

Amendment or the Tenth Amendment the precise contours of the federal government's powers *vis-à-vis* the states' nor does it describe what powers are left to the states.¹⁵⁹

The framers believed that the structure of the federal government itself could adequately protect state interests against government power through the use of the electoral process to represent state interests in both houses of Congress, especially the Senate.¹⁶⁰ Moreover, even if the Ninth Amendment and Tenth Amendment originally were meant as substantive obstacles to the exercise of the federal government's power, such obstacles, if they ever existed, were removed with respect to equal protection and racial discrimination with the passage of the Thirteenth Amendment, Fourteenth Amendment, and Fifteenth Amendment, collectively known as the Civil War Amendments.¹⁶¹ The express terms of these amendments subordinate states' rights to the federal protection of constitutional rights.¹⁶² Because school desegregation cases and equal-educational opportunity cases like *Rodriguez* are usually brought as violations of the Fourteenth Amendment's equal protection clause, the conclusion that a prior state right to local control ought to trump an individual right to equal protection is unsound.¹⁶³

2. Local Control

The second federalism argument, local control, assumes that the states are most capable of effectuating the community's goals and protecting individual rights. The first part of the argument may be correct insofar as it describes the greater ability of the states and local governments to implement the goals of their respective communities.¹⁶⁴ The concept of federalism upon which the argument relies has been

159. See McConkie, *supra* note 149, at 396.

160. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 551 (1985) ("Madison placed particular reliance on the equal representation of the States in the Senate, which he saw as 'at once a constitutional recognition of the portion of sovereignty remaining in the individual States, and an instrument for preserving that residuary sovereignty'" (quoting *The Federalist* No. 62 (Alexander Hamilton or James Madison))).

161. McConkie, 1996 BYU L. REV. 389 at 395.

162. *Id.*

163. See *id.* at 394.

164. *Rodriguez*, 411 U.S. at 49-50 ("The persistence of attachment to government at the lowest level where education is concerned reflects the depth of commitment of its supporters . . . [L]ocal control means . . . the freedom to devote more money to the education of one's children . . . [T]he opportunity it offers for participation in the decision making process that determines how those local tax dollars will be spent. Each locality is free to tailor local programs to local needs. Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence. . . . Mr. Justice Brandeis identified as one of the peculiar strengths of our form of government each State's freedom to 'serve as a laboratory; and try novel social and economic experiments'").

revised since the adoption of the Civil War Amendments.

The local control argument ignores the very reason for revising the antebellum system of federalism, which was the recognition that local communities often had the improper goal of subordinating racial minorities.¹⁶⁵ Even Justice Scalia, a strident local control and rights proponent notes that the framers of the Civil War Amendments distrusted the states to protect the rights of minorities because “racial discrimination against any group finds a more ready expression at the state and local than at the federal level.”¹⁶⁶

In sum, where it had previously been accepted that states were better at protecting individual rights than the federal government, which was then viewed as the body most likely to undermine the individual, the national concept of federalism shifted as notions of individual rights broadened to include the rights of racial minorities. After the Civil War it was the states, not the federal government, that sought to curtail the rights of its citizens.¹⁶⁷ The federal government by contrast, has been a more consistent protector of minority rights. This post-bellum history of federal minority protection and state-sponsored segregation and subordination must not be ignored. Presumed race-neutrality permits a reversion to these antiquated, racially exclusionary, federalism arguments upon which local control advocates rely.

B. Political and Economic Citizenship

We know that education is everything to our children's future. We know that they will no longer just compete for good jobs with children from Indiana, but children from India and China and all over the world.

~ Barack Obama, Chicago Church Speech (June 15, 2008)¹⁶⁸

The future growth and success of the U.S. economy and democracy is tied to education. Since *Brown*, the Court has recognized that full

165. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 490 (1954).

166. *Printz v. United States*, 521 U.S. 898, 928 (1997) (“It is an essential attribute of the States’ retained sovereignty that they remain independent and autonomous within their proper sphere of authority.”); *Richmond v. J.A. Croson Co.*, 488 U.S. 486, 522-23 (1989) (Scalia, J., concurring); McConkie, *supra* note 149, at 393.

167. From the Jim Crow laws, to segregated schools, to continuing grossly disparate educational quality and funding; the states have repeatedly demonstrated themselves to be the enemy rather than the champion of the rights of its minority citizens. The Fourteenth Amendment protects the discrete and politically powerless minority from the oppression of the majority. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938); JOHN STUART MILL, *ON LIBERTY* (1859) (coining the term “tyranny of the majority”); THE FEDERALIST NO. 10 (James Madison) (the violence of the majority faction).

168. Barack Obama, *Father’s Day 2008*, in *CHANGE WE CAN BELIEVE IN: BARACK OBAMA’S PLAN TO RENEW AMERICA’S PROMISE* 233, 237 (Obama for America ed., 2008).

democratic participation requires each person to obtain a baseline level of knowledge and understanding.¹⁶⁹ America's leaders from across the political spectrum have recognized the importance of public education.¹⁷⁰ However, despite its recognized importance, the Court continues to deny the existence of a constitutional duty to provide public education because it is not "among the rights afforded explicit protection under our federal Constitution."¹⁷¹ However, the right can be regarded as a precursor to other rights, including the right to vote.¹⁷²

In addition to the democratic concerns, the research and scholarship confirms that a nation's economic prosperity is dependent upon the quality of education it provides its children today.¹⁷³

Many welfare economists recognize a link¹⁷⁴ between quality education and national prosperity as measured by gross domestic product (GDP).¹⁷⁵ According to Phillip Stevens and Martin Weale from the National Institute of Economic and Social Research, the connection is demonstrated by the following formula:

$$\text{In GDP per Capita} = 0.35 \text{ in enrollment rate} + 5.23^{176}$$

"Thus this formula suggests that a one per cent increase in the enrolment rate raises GDP by 0.35 per cent."¹⁷⁷ According to Stevens and Weale's theory, increased investments in education ultimately increase innovation, which in the long-term increases a nation's GDP.¹⁷⁸

Education is important to both the U.S. economy and to democracy.

169. *Brown*, 347 U.S. at 493.

170. See President Barack Obama, McCain-Obama Speeches at 99th NAACP Convention (July 12, 2008), available at http://www.ontheissues.org/Archive/2008_NAACP_Barack_Obama.htm ("[T]he fight for social justice and economic justice begins in the classroom."); No Child Left Behind Policy (Jan. 8, 2002) ("If our country fails in its responsibility to educate every child, we are likely to fail in many other areas."). See also *id.* ("If a nation expects to be ignorant and free, in a state of civilization, it expects what never was and never will be."—Thomas Jefferson, 1816").

171. See also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 4, 35 (1973).

172. See *id.* at 36.

173. Philip Stevens & Martin Weale, *Education and Economic Growth*, in INTERNATIONAL HANDBOOK ON THE ECONOMICS OF EDUCATION 164, 164 (Geraint Johnes ed., 2004).

174. *Id.* at 5.

175. *Id.* at 166.

176. *Id.* "There are two very basic reasons for expecting to find some link between education and economic growth. First of all at the most general level it is intuitively plausible that living standards have risen so much over the last millennium and in particular since 1800 because of education. . . . Secondly, at a more specific level, a wide range of econometric studies indicate that the incomes individuals can command depend on their level of education. . . . The process of education can be analysed as an investment decision." *Id.* at 164.

177. The formula is based on long term observations of the effect of education on an economy. *Id.* at 167.

178. See *id.*

It was not an accident that both education rights and securing the right to vote were two central aims of the 1960's Civil Rights movement. Education and voter franchisement are linked and of primary importance in democratic society. Voting rights and the Fifteenth Amendment arose out of the reconstruction era concern that southern whites would attempt to deny the newly freed blacks the franchise. This concern proved justified when immediately after the Tilden-Hayes Compromise Union troops were withdrawn from the South.¹⁷⁹ Southerners then enacted a series of Jim Crow laws which purpose and effect were to deny blacks the right to vote.¹⁸⁰ The relevance of this is that the movement to secure integrated public education in the middle of the twentieth century was a part of a greater, overall movement to abolish Jim Crow laws specifically and American racial hierarchy generally. Insofar as *Brown's* holding rings true, that separate is inherently unequal, the struggle for educational equity is necessarily federal in scope.¹⁸¹

Unfortunately, the *Rodriguez* Court did not find the voting rights arguments convincing.¹⁸² Perhaps this was because the notion of "a right to vote" was one that the majority did not entirely accept as existing under the U.S. Constitution.¹⁸³ Justice Powell undermined the existence of the right when he stated: "Since the right to vote, per se, is not a constitutionally protected right, we assume that appellees' references to that right are simply shorthand references to the protected right, implicit in our constitutional system."¹⁸⁴ Justice Powell's undermining of the constitutional quality of the right to vote may be because he and others still perceived civil rights as minority rights and not yet as human rights.¹⁸⁵ In light of previous and subsequent

179. See RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 61-62 (1976).

180. A few examples from 1890 to 1908 include requirements for poll taxes, residency requirements, rule variations, literacy and understanding tests that achieved power through selective application against minorities, or were particularly hard for the poor to fulfill. Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 *Const. Comment.* 295, 295-96 (2000).

181. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

182. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 4, 36 (1973).

183. *Id.* at 35, n.78.

184. *Id.*

185. See *id.*; see also Thomas Basile, *Recent Development: Inventing the "Right to Vote,"* in *Crawford v. Marion Election Board*, 32 *HARV. J.L. & PUB. POL'Y* 431, 438 n.5 (2009) ("Importantly, the Court never has held that the Fourteenth Amendment endows American citizens with an independent and freestanding right to vote that can be invoked, for example, to compel the government to render unelected public positions subject to direct election by voters. Rather, as a product of the Equal Protection Clause strand of the Court's "fundamental rights" jurisprudence, the essence of the right to vote is that, once the government chooses to extend the franchise to citizens, it must do so on an equal basis.").

affirmations of the right to vote, most reasonable people would agree that it is time to revisit this aspect of the Court's holding.¹⁸⁶

At the time *Rodriguez* was decided, the enforcement of the right to vote was primarily seen as a means of expanding the franchise to racial minorities.¹⁸⁷ Given the racial backdrop and the majority's denigration of the right to vote, one could conclude that despite the Court's formal statements to the contrary, race and judgments as to the value of racial equality were at the core of *Rodriguez*. Like voting rights for blacks, the *Rodriguez* Court demonstrated an analogous hostility towards education rights for Mexican-Americans.¹⁸⁸ The Court here chose to ignore race as a formal concern, describing the primary motive as economic.¹⁸⁹

Bitensky is one of many scholars, including the aforementioned Dewey, who acknowledges a necessary connection between education and the right to vote.¹⁹⁰ Bitensky's basic argument with regard to this right's connection to education is that the existence of a right to vote seems unquestionable given the Supreme Court's unambiguous articulation of the right in *Reynolds v. Sims*.¹⁹¹ Although some commentators, including Justice Powell and the *Rodriguez* majority as noted earlier, have expressed some ambivalence regarding the constitutional character of the right to vote, most scholars and practitioners accept that there is a right to vote under the U.S. Constitution.¹⁹² Bitensky's basic argument with regard to this right's connection to education is that "[i]nsofar as it may be assumed that a constitutional right to vote exists . . . then there must also exist a correlative, implied positive right to education . . . because it is education which makes the vote meaningful."¹⁹³

186. See *Shaw v. Reno*, 509 U.S. 630, 657 (1993); *Oregon v. Mitchell*, 400 U.S. 112, 135 (1970); *Reynolds*, 377 U.S. at 554.

187. See *Shaw*, 509 U.S. at 630; *Oregon*, 400 U.S. at 135; *Reynolds*, 377 U.S. at 554.

188. *Rodriguez*, 411 U.S. at 4-6.

189. See *id.*

190. Bitensky, *supra* note 20, at 574-79; see also U.S. House Judiciary Committee, Preserving Democracy, 14 (Jan. 5 2005) ("Under the Equal Protection Clause of the Fourteenth Amendment, *Reynolds* and its progeny require that votes that are cast must actually be counted. The Equal Protection Clause also requires that all methods the 'legislature has prescribed' to preserve the right to vote be effected, not thwarted").

191. *Reynolds*, 377 U.S. at 554 ("Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections."); Chambers, Jr., *supra* note 133, at 1425-26 ("[t]he right to vote that the Fourteenth Amendment protects against infringement can be found in state law or more generally in the Constitution as a fundamental right that has evolved from the Constitution . . ." Given the context in which it was passed and its goal of providing political equality through its requirement of equal voting rights, the Fifteenth Amendment should protect such rights somewhat more aggressively than the Fourteenth Amendment protects other constitutional rights.").

192. See *Rodriguez*, 411 U.S. at 35-36.

193. See Bitensky, *supra* note 20, at 606.

The Court itself has acknowledged the democratic significance of education.¹⁹⁴ In *Wisconsin v. Yoder*, issued one year before the infamous *Rodriguez* decision, the Court discussed the democratic necessity of education stating that “education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.”¹⁹⁵ Education becomes increasingly important as electoral choices continue to implicate the understanding of ever more complicated issues.¹⁹⁶ While making a meaningful electoral choice may not necessitate an ability to comprehend the intricacies of every monumental issue of today, politically purposive, electoral conduct does at least require that citizens be capable of attaining an understanding of these issues and how different policies may ultimately impact them.¹⁹⁷ Denial of a quality education is a denial of the intellectual tools necessary for the meaningful exercise of the franchise, amounting to an effective denial of the right to vote.

C. *Privileging the Privileged*

The Court’s failure to acknowledge a federal constitutional duty to provide quality public education¹⁹⁸ has a disproportionately negative impact on minorities. What has been described as the Court’s colorblind or race-neutral approach to education rights has in fact effectively given license to continuing racial inequality in education and has barred efforts to stop the current wave of school resegregation.¹⁹⁹ The problem of a purportedly liberal concept of colorblindness furthering racial inequality has been well discussed and widely acknowledged. In the education context, racial inequality is exacerbated by privileging the rights of the privileged, which has been accomplished by cramming the right to public education—a duty that must be fulfilled by the government—into the Court’s current fundamental rights analysis, which is more appropriate for negative rights or liberties.

In *Milliken v. Bradley*, the Court applied the *Rodriguez* line of race-neutral, negative rights-based reasoning to rule against allowing an interdistrict school busing remedy to address segregated schools in Detroit and the surrounding areas.²⁰⁰ There the Court determined the

194. See *Rodriguez*, 411 U.S. at 40-41; *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

195. *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) (quoting Thomas Jefferson).

196. See *Rodriguez*, 411 U.S. at 35-36.

197. See Bitensky, *supra* note 20, at 604.

198. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 4 (1973) (“This case failed to recognize a federal constitutional duty to provide quality public education.”).

199. *Rodriguez*, 411 U.S. at 35-36.

200. *Milliken v. Bradley*, 418 U.S. 717, 741 (1974).

segregative impact of “white flight” to the Detroit suburbs to be “mere” *de facto* segregation that was not subject to judicial relief.²⁰¹ *Milliken* set the precedent for judicial inaction in what has become the all-too-typical story of the segregative impact of the “white flight” phenomenon. The Court’s education jurisprudence effectively ensures that the segregative impact of white flight will continue unchecked and thereby further educational inequality, as is seen in the more recent *Parents Involved* case.²⁰²

1. Privileging Perspective

The Court has applied federalism-inspired local control arguments as a basis for ruling that busing and other segregation remedies involving more than a single school district are unconstitutional.²⁰³ An early example of this is *Milliken v. Bradley*, where the majority held that such an inter-district remedy may only be applied where the suburban white school district contributed to or enabled unconstitutional school segregation within the non-white urban school district.²⁰⁴ While the *Rodriguez* majority was able to pretend that race was not a pertinent factor in its equal protection analysis,²⁰⁵ the *Milliken* majority could not so easily ignore race in a case about the clearly segregated Detroit City school district.²⁰⁶ Instead, the Court adopted what Professor Alan David Freeman has termed a *perpetrator’s perspective* by privileging the liberty of white suburbanites to local control over their schools over the rights of the minority children to receive a racially integrated, quality

201. *Id.* at 748.

202. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); see Powell, *supra* note 134, at 410.

203. *Milliken*, 418 U.S. at 741-42 (“No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.”).

204. The Court reasoned that an inter-district remedy to a demonstrated violation of Equal Protection, even if it occurs within the same state, ultimately serves to undermine the core principles of local control. In reaching its holding, the *Milliken* court invoked the *de jure/de facto* distinction, claiming that because the suburban districts in question were not currently and had not previously been part of a legally mandated scheme of segregation, the resulting segregation was the result of private action and amounted to *de facto* segregation. The Court ruled that *de facto* segregation is not subject to judicial relief. See *id.* at 745.

205. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 4, 37-38 (1973).

206. “[A]n interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. . . . With no showing of significant violation by the 53 outlying school districts and no evidence of any interdistrict violation or effect, the court went beyond the original theory of the case as framed by the pleadings and mandated a metropolitan area remedy.” *Milliken*, 418 U.S. at 745 (discussing requirement for segregative intent).

education,²⁰⁷ thus ignoring the continuing wrong done to the victims.²⁰⁸ By valuing the importance of leaving “non-guilty parties” alone, higher than the importance of making the victims whole, the Court devalued the victims and their injury.²⁰⁹

Justice Douglas, in his *Milliken* dissent, recognizes a glaring inconsistency in the Court’s approach to a Detroit metropolitan area remedy.²¹⁰ For Douglas, the state action requirement was met in *Milliken*, especially when analogized to previous cases where the Court had recommended metropolitan treatment of metropolitan problems.²¹¹ However, the Court chose to treat school desegregation discretely by respecting boundaries of administrative convenience over the segregated reality of Detroit area schools.²¹²

Arguably, there is no significant constitutional difference between *de facto* and *de jure* segregation in the public schools context since “[e]ach school board performs state action for Fourteenth Amendment purposes when it draws the lines that confine it to a given area, when it builds schools . . . when it allocates students.”²¹³ The segregated Detroit

207. *Milliken* looked past the plaintiff’s main point, which was not based on an argument regarding the range of legal fairness to the suburbanites who would have become a part of a Detroit area “super-district.” Rather, the main point of the suit was to undo the wrong caused to the Detroit children by racially motivated white-flight from the Detroit schools. The decision, however, is a perfect example of the Court invoking Freeman’s perpetrator perspective. Under Freeman’s theory, the concept of racial discrimination may be approached from two perspectives: that of the victims, and that of its perpetrators. The victim perspective appreciates the conditions of actual social existence as a member of a subordinated group. The perpetrator perspective does not describe racial discrimination in terms of conditions but describes it in terms of actions or a series of actions inflicted on the victim by the perpetrator. The core difference is that the perpetrator perspective focuses more on what the perpetrator has done, whereas the victim perspective focuses more on the condition of the victim. See *id.* at 745; Freeman, *supra* note 130, at 1052-54.

208. *Milliken*, 418 U.S. at 745 (looking only to whether there was purposeful discrimination regardless of affect).

209. See *id.* at 754 (requiring proof of intentional discrimination, perpetrator’s prospective, rather than focusing on the segregative affect on minority education, victims prospective).

210. *Id.* at 758 (Douglas, J., dissenting) (“If this were a sewage problem or a water problem or an energy problem, there can be no doubt that Michigan would stay well within federal constitutional bounds if it sought a metropolitan remedy.”).

211. See *id.*

212. See *id.*

213.

The creation of the school districts in Metropolitan Detroit either maintained existing segregation or caused additional segregation. Restrictive covenants maintained by state action or inaction build black ghettos. It is state action when public funds are dispensed by housing agencies to build racial ghettos. Where a community is racially mixed and school authorities segregate schools, or assign black teachers to black schools or close schools in fringe areas and build new schools in black areas and in more distant white areas, the State creates and nurtures a segregated school system, just as surely as

schools were not the *de facto* or “natural” result of private choices, but the desired and intentional result of *de jure* acts of segregation that helped grow a core of black-only schools within Detroit, thus encouraging African Americans to move into parts of Detroit and encouraging whites to move elsewhere.²¹⁴

Despite the obvious problems with *Milliken*, the Court today applies an expanded perpetrator’s perspective that today threatens to enshrine resegregation and racialized educational inequity as the status quo.²¹⁵ As Professor Powell notes, “*Parents Involved* is the 21st Century affirmation of the Court’s narrow approach [in *Milliken*].”²¹⁶ In *Parents Involved*, the Court held racially-based school integration efforts to be unconstitutional, based in part on the notion that using race as criteria, even to further integration, violates the Fourteenth Amendment’s equal protection clause.²¹⁷

According to Professor Powell, the Court’s view is that while “there are vestiges of discrimination that can be remedied by desegregation decrees . . . there are ‘other desegregative forces’ which are irremediable . . . [For the Court] resegregation is a ‘natural’ occurrence.”²¹⁸

We see here the impact the *Rodriguez* decision has had on education to the point that its holding has now been applied to effectively run counter to the integration goals of *Brown*. In continuing to apply the libertarian perspective, the *Parents Involved* court privileged the liberty interests of white suburbanites over the duty to provide all children an integrated education. The application is that today, resegregation and resulting educational inequalities across school districts are *natural* or *de facto* occurrences in the sense that these inequalities are not the result of any intentional state action. Rather, for the Court, they are the result of racially motivated private actions that the state ought not attempt to cure.²¹⁹

Given the American tendency to protect the privileges of already privileged whites over the rights of minorities, it would be more

did those States involved in *Brown* when they maintained dual school systems.

Id. at 761 (Douglas, J., dissenting). Justice Douglas analogizes state action in the educational context to state action and inaction in the context of racially restrictive covenants. *Id.*

214. Powell, *supra* note 134, at 410 (quoting *Milliken*, 409-10 U.S. at 805 (Marshall, J., dissenting)).

215. *Id.* at 410.

216. *Id.* at 411.

217. *Id.* at 402; *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 734-35 (2007).

218. Powell, *supra* note 134.

219. *Id.* at 114.

appropriate for the Court to remedy the discrimination, rather than continue to regard the perpetrators' liberty interests as controlling.²²⁰ Yet the liberty interests of privileged suburban whites continue to trump the education rights of minorities as seen in *Parents Involved*. In this case, simply using race as a factor in school placement decisions, as a method of encouraging integration, was held to be unconstitutional.²²¹

2. Privileging Liberty over Duty

The current education rights doctrine combines the perpetrators' perspective, described above, with a negative rights or a *libertarian perspective*.²²² The *libertarian perspective* is primarily concerned with maintaining existing privileges and liberties, while deemphasizing the importance of positive rights or duties. The *libertarian perspective* helps to enshrine an unjust distribution of resources by protecting the rights of the unfairly privileged to maintain exclusive privileges.²²³ In the context of the modern educational doctrine, ruling that a government cannot integrate across school districts gave local governments the liberty to act without being hindered.²²⁴ The consistent privileging of local government liberties over the duty that the government owes its people helped to block desegregation efforts in *Milliken*.²²⁵ This negative rights, or liberty bias, has had repercussions beyond the educational context. *Milliken* arguably served as a catalyst for escalating the white flight phenomenon away from cities and other urban areas like Detroit.²²⁶

The *de facto/de jure* distinction invoked by the Court in *Milliken* illustrates the general problem the Court has faced in recognizing a general, private, liberty right at the expense of duties or positive rights, especially when those duties are owed to minorities.²²⁷ Minorities are expected to sacrifice some portion of their rights rather than risk infringing on the majority's liberty.²²⁸

One reason for concern regarding situations like *Milliken* is that as

220. See Freeman, *supra* note 130, at 1059-61.

221. FRANKENBERG ET AL., *supra* note 25, at 11-12.

222. See generally James P. Sterba, *From Liberty to Welfare*, 106 ETHICS 64 (1994).

223. See West, *supra* note 56, at 831.

224. *Milliken v. Bradley*, 418 U.S. 717, 754 (1974).

225. See generally Powell, *supra* note 134.

226. Batchis, *supra* note 68, at 120.

227. See *Watson v. Fort Watson*, 487 U.S. 977, 1000 (1988) (holding that a minority employee had not met her burden of proof under the discriminatory treatment evidentiary standard and therefore dismissed the action); *Washington v. Davis*, 426 U.S. 229, 252 (1976); *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 208 (1973).

228. *Contra* THE FEDERALIST NO. 10 (James Madison) (discussing importance of protecting minority rights at the cost of the majority's liberty).

affluent whites flee, they take with them their property taxes, which is the primary basis for funding education under most of the funding schemes used throughout the United States.²²⁹ In addition, American society attaches a negative stigma to all institutions that are predominantly minority.²³⁰ The value of an integrated education to minority students lies therefore not just in the existence of funds, but also in the credibility of having attended schools of merit.

As Justice Marshall notes in his dissent,

Racially identifiable schools are one of the primary vestiges of state-imposed segregation which an effective desegregation decree must attempt to eliminate . . . there is a presumption against schools that are substantially disproportionate in their racial composition. . . . The goal

229.

[S]ubtle segregationist policies are illustrated most forcefully in the context of school funding. . . . This . . . occurs in schools throughout the country, where segregated housing patterns result in the existence of predominantly black, inner-city schools, and predominantly white, suburban schools. The funding discrepancy between the wealthy suburbs and poor cities is largely a product of local laws governing property taxes, upon which most schools in this nation depend for their initial funding property tax revenues depend upon the taxable value of homes and local industries. Thus, a wealthy suburb with highly valued homes provides a much larger tax base in proportion to its student population than an inner-city occupied by thousands of destitute persons. . . . The federal income tax scheme appears to exacerbate these systemic funding discrepancies. Because the federal government allows property taxes to be deducted from taxable income . . . This tax deduction essentially is tantamount to a federal public education subsidy.

See Jared A. Levy, *Blinking at Reality: The Implications of Justice Clarence Thomas's Influential Approach to Race and Education*, 78 B.U. L. REV. 575, 604-06 (1998).

230. See generally Nia Mason, *Minority Recruitment Efforts Aimed at Increasing Student Diversity at Historically Black Public Colleges and Universities and Predominantly White Public Institutions* (May 2006) (unpublished M.M.C. thesis, Louisiana State University) (on file with Electronic Thesis and Dissertation Library, Louisiana State University) (on file with Electronic Thesis and Dissertation Library, Louisiana State University) (citing Marybeth Gasman, *Brown v. Board's Legacy and Contemporary Black Higher Education*, 8 DIVERSITY DIG. 8, 8-9 (2004).

[T]here has been a stigma of inferiority attached to [Historically black colleges and universities] HBCUs since their establishment. Part of this stigma is the idea that all HBCUs are substandard in comparison with [Predominantly White Institutions] PWIs, and they are consequently lumped into one category. Although strides are being made to overcome these stereotypes, attracting white students to institutions that are viewed as socially substandard has proved difficult.

Id. at 18-19.

is a school system without white schools or Negro schools—a system with just schools.²³¹

As Justice Marshall saw it, the problem with the *Milliken* decision, limiting the scope of desegregation efforts to just the Detroit schools, was that it would not achieve actual desegregation. The opportunity to meet and study alongside children of the wealthy and privileged opens up a lifetime of opportunities that segregated systems deprive non-white, non-affluent students of.²³²

Our courts should not follow a course that leaves the full burden of segregative harms on the victims for fear of undermining the liberty of the privileged.²³³ Today, minority children continue to suffer the negative results of an inherently racist allocation of resources and continuing actual segregation in America's schools.²³⁴ The Court should cast aside its current *libertarian perspective* and instead begin a positive rights-based education jurisprudence. Viewed from a positive perspective, unequal educational resource distribution and segregated schooling is a violation of a state's duties to its citizens. Inequality is neither a natural nor is it a constitutionally acceptable status quo. Our current private liberty-privileging situation is no fairer and no more consistent with the U.S. Constitution than a system that would guarantee everyone in America an equal opportunity to succeed.

V. JUDICIALLY RECOGNIZING A RIGHT TO PUBLIC EDUCATION

The fact that many clauses of the Constitution tend to independently support the existence of an education right strengthens the argument that the Constitution itself supports a right to public education. At least one scholar has argued that the Fourteenth Amendment's due process clause creates a negative right in the sense that "rather than imposing any affirmative obligation upon government to provide education, it simply forbids government from impeding individuals in their quest for information and enlightenment."²³⁵ It follows that independent to the

231. *Milliken v. Bradley*, 418 U.S. 802-03 (1974) (Marshall, J. dissenting) (citing *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 25-26 (1971); *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430, 44 (1968)).

232. See FRANKENBERG ET AL., *supra* note 25, at 14.

233. *Milliken*, 418 U.S. at 782 (Marshall, J., dissenting) ("[T]he Court's answer . . . provide[s] no remedy at all for the violation proved in this case, thereby guaranteeing that Negro children in Detroit will receive the same separate and inherently unequal education in the future as they have been unconstitutionally afforded in the past.").

234. JESSE L. JACKSON JR. & FRANK E. WATKINS, *A MORE PERFECT UNION ADVANCING NEW AMERICAN RIGHTS* 230 (1st ed. 2001).

235. See Bitensky, *supra* note 20, at 553, 564.

aforementioned need to recognize a constitutional duty to provide public education, the document necessarily presupposes a well-educated citizenry in order to bring meaning to the other rights it implicates.²³⁶

A. Judicial Recognition Approaches

David Thompson argues that the existing case law does not necessarily preclude finding education as a fundamental right.²³⁷ According to Thompson, precedent is ambiguous with regard to the scope of federal protection for education.²³⁸ Several cases after *Rodriguez* indicate there is some limited federal protection of education and that equal protection at least extends to unreasonable governmental action.²³⁹ Current precedent fails to both fully protect and fully reject the notion of constitutionally protecting education.²⁴⁰

Plyler v. Doe is one case that highlights the current ambiguity regarding education's status as a federal right.²⁴¹ The issue in *Plyler*, a case brought a decade after *Rodriguez*, was whether the state of Texas could deny free public education to the school-age children of undocumented immigrants.²⁴² Here, the Court held that immigrants, even immigrants whose presence in this country is unlawful, are entitled to equal protection under the law.²⁴³ Though the Court explicitly stated that education is not a right protected by the U.S. Constitution, it nonetheless recognized the fundamental role education plays in American society.²⁴⁴ "In sum, education has a fundamental role in maintaining the fabric of [American] society. We cannot ignore the significant social costs borne to our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests."²⁴⁵

Absent the furtherance of some substantial state purpose, the Court held that denying the school-age children of undocumented immigrants an education violated the equal protection clause.²⁴⁶ According to Thompson, this essentially amounts to intermediate scrutiny, requiring

236. DEWEY, *supra* note 31, at 183.

237. David C. Thompson, *School Finance and the Courts: A Reanalysis of Progress*, 59 EDUC. LAW REP. 945, 950 (1990).

238. *Id.*

239. See *Papasan v. Allain*, 478 U.S. 265, 273, 275 (1986); *Plyler v. Doe*, 457 U.S. 202, 221-22 (1982); *Sheff v. O'Neill*, 678 A.2d 1267, 1279 (Conn. 1996).

240. *Papasan*, 478 U.S. at 273, 285; *Plyler*, 457 U.S. at 221; *Sheff*, 678 A.2d at 1279.

241. *Plyler*, 457 U.S. at 223.

242. *Id.* at 205.

243. See *id.* at 215.

244. See *id.* at 202.

245. *Id.* at 221.

246. See *id.* at 224.

that the scheme must be “substantially related to an important state interest.”²⁴⁷

Another example of the Court’s ambiguous stance on the fundamentality of education is *Papasan v. Allain*, a case about a gross disparity in educational financing by the state of Mississippi in lands previously held by the Chickasaw Indian Nation.²⁴⁸ The Court here said that though education is not itself a fundamental right, there still *might* exist a fundamental right to a minimally adequate education.²⁴⁹ Such a fundamental right would trigger strict scrutiny. “As *Rodriguez* and *Plyler* indicate, this Court has not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded equal protection review.”²⁵⁰ The *Papasan* Court vacated the lower court’s judgment regarding the equal protection claim, holding that the allegation of discrimination, absent a legitimate state interest, was sufficient to state a cause of action under the equal protection clause and must be decided on remand.²⁵¹ According to Thompson, “though *Papasan* failed to test the federal question, it clearly indicated some limited federal protection for education as the court ruled that Equal Protection at least extends to unreasonable governmental action.”²⁵²

Examining *Plyler* and *Papasan* in the context of the *Rodriguez* decision, there is an apparent progression in the levels of scrutiny that are deemed relevant in educational discrimination cases.²⁵³ In *Plyler*, the Court applied intermediate scrutiny as the proper standard in reviewing a state law denying the children of undocumented immigrants education.²⁵⁴ In *Papasan*, the Court left open the possibility of examining some education discrimination cases as involving the denial of a fundamental right.²⁵⁵ These cases together demonstrate, as Thompson argues, that the Court’s overall division and hesitancy in this area has left open the possibility of a strict scrutiny fundamental rights

247. *Shapiro v. Thompson*, 394 U.S. 618, 650 (1969).

248. *Papasan v. Allain*, 478 U.S. 265, 284 (1986) (“Some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either [the right to speak or the right to vote]”).

249. *See Papasan*, 478 U.S. at 285.

250. *See id.*

251. *Id.* at 289.

252. *Thompson*, 394 U.S. at 950.

253. *Papasan*, 478 U.S. at 215, 230; *Plyler v. Doe*, 457 U.S. 202, 215 (1982).

254. *Plyler*, 457 U.S. at 215.

255. *Papasan*, 478 U.S. at 284 (“Some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either [the right to speak or the right to vote]”).

analysis for education cases.²⁵⁶ It follows from these cases that the Court has not clearly stated that a state's denial to a child of a minimally adequate education does not violate a fundamental constitutional right.²⁵⁷ Thompson's approach to gaining judicial recognition of a right to public education invokes the notion of minimal adequacy expounded in these cases.²⁵⁸ He argues that the Court has itself recognized that there is a right to public education, which is implied by the Constitution.²⁵⁹

B. Critiques of Judicial Recognition Approaches

Under Thompson's "minimal adequacy" approach, there continues to exist a possibility for the Court to recognize some form of fundamental right to public education that will be fully protected as though it were explicitly written into the Constitution.²⁶⁰ Although Thompson's approach to judicial recognition of the right does not foreclose the possibility for strict scrutiny as the standard of review for education rights cases, the notion of minimal adequacy itself creates some problems.²⁶¹

The concept of a "minimally adequate education" flows from language used in *Rodriguez* and its progeny.²⁶² This language has since been applied to describe the quality of education that is necessary to obtain the level of knowledge necessary for full democratic participation.²⁶³

The recognition of a fundamental right to a *minimally* adequate education would not sufficiently reflect the significance of education to American society.²⁶⁴ Something more than minimal adequacy ought to be invoked to properly encapsulate the importance of education in contributing to individuals capabilities as citizens. A shift in rhetoric to a minimal adequacy standard would amount to little change in the level scrutiny shown to education cases because minimal adequacy is the

256. See *Thompson*, 394 U.S. at 952.

257. See *Papasan*, 478 U.S. at 289; *Plyler*, 457 U.S. at 215.

258. See *Thompson*, 394 U.S. at 952.

259. See *id.*

260. See *id.*

261. *Plyler*, 457 U.S. at 221 ("Education is not a 'right' granted to individuals by the Constitution. But neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation." (alteration of original)); *Toledo v. Sanchez*, 454 F.3d 24, 33 (1st Cir. 2006) (quoting *Plyler*, 457 U.S. at 221).

262. Black, *supra* note 38, at 1406 (noting that the *Rodriguez* court left open the question of whether there is a federal fundamental right to a minimally adequate education).

263. *Id.* at 1408 ("A minimally adequate education can be nothing less than the qualitative minimums that the states have indicated students must receive").

264. See *id.*

current effective standard.²⁶⁵ Ultimately this approach fails to address the fundamental problem: the need for quality education for all Americans, regardless of race, wealth, or lineage; and the lack of a legal recourse when that necessity is denied.

Furthermore, minimal adequacy is grounded in the same negative rights-based standards of liberty that led to the states' current failure to fully enforce the duties the state owes to its children. The state owes duties that go beyond preparing its citizens to properly fulfill their obligations as citizens.²⁶⁶

However, neither rational basis review nor strict judicial scrutiny of existing laws regarding public education fully addresses the scope of the government's duty to provide a public education. A new positive rights-based jurisprudence is necessary for appropriately addressing the distinct issues regarding state, including duties such as the duty to provide a public education.

The current doctrine that there is no right to public education flows from the profound confusion regarding fundamental rights as duties. Negative rights or liberties are primarily protections from government infringement on individual activities and prohibitions on government actions that discriminate against a protected classes. Examples include the fundamental right to travel and the right to procreation, neither of which are explicit in the text of the Constitution.²⁶⁷ However, both of these are interpreted to *bar the government from taking action* that infringes on either of the liberties but do not require the government to actually take any action.²⁶⁸ The current levels of equal protection

265. While the state constitution creates a fundamental right to "general and uniform system of education" for the purposes of equal protection analysis, that right does not extend to funding education systems beyond providing basic funding to assure that a general and uniform system is maintained and, thus, while strict scrutiny analysis should be applied in determining whether a legislature has met a student's fundamental right to general and uniform system of public schools, a lesser standard of rational basis test should apply to determine whether financing of such a system is thorough and efficient. *See, e.g., Skeen v. State*, 505 N.W.2d 299, 315 (Minn. 1993).

266. *But see Black*, *supra* note 38, at 1406-09; *Id.* at 1369 n.117 ("Some commentators project that adequacy litigation, as well as No Child Left Behind, may have their own negative consequence: legislatures lowering their qualitative standards to demonstrate more easily that students are meeting them."). *Id.* at 1389-90 ("[H]igh profile litigation, failed litigation in particular, could easily educate the public and focus its attention on immediate change in a way that organizing alone might take years to do. This has proven true on more than one occasion at the state level.").

267. *Saenz v. Roe*, 526 U.S. 489, 504-07 (1999); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); Joseph O. Oluwole, *Public Employment-Free Speech Jurisprudence: A New Constitutional Test for Disciplined Whistleblowers*, 19 U. FLA. J.L. & PUB. POL'Y 421, 464-65 (2008) (recognizing that a fundamental right is explicitly or implicitly guaranteed by the U.S. Constitution).

268. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 686 (1977) ("Compelling" is of course

scrutiny—rational basis test, intermediate and strict scrutiny—are well-suited for protecting negative rights or liberties, but are not as useful in enforcing positive rights or duties.²⁶⁹

A lawsuit to declare a law void and unenforceable is essentially different from a lawsuit seeking to require the government to act and provide a service.²⁷⁰ It is not that courts are capable of only addressing the former, as evidenced by the already existing models for such suits in areas of Social Security, Medicare, and other “entitlement litigation.”²⁷¹ Rather, the problem is that the Court’s current rights analysis effectively conflates liberties and duties so that the same negative rights-styled analysis applies to all constitutional rights.²⁷² What this translates to, in the context of education, is a situation where the Court is comfortable announcing the significance of education, but uncomfortable declaring it a fundamental right.²⁷³

Viewed from the perspective of rights as liberties, the concern with declaring a fundamental right to education is that education would be strictly scrutinized, thus causing the undesired result of preventing the enactment of laws regarding education.²⁷⁴ This would not be a concern if the Court embraced a constitutional analysis that specifically applied to positive rights and duties. The details of such an analysis are beyond

the key word; where a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests.”); *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969) (“Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest.”), *rev’d on other grounds*, *Edelman v. Jordan*, 415 U.S. 651 (1974).

269. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-42 (1985); *In re Cox*, 393 B.R. 681, 688-89 (Bankr. W.D. Mo. 2008); Samuel L. Bufford, *Constitutional Problems in the 2005 Bankruptcy Amendments*, 82 AM. BANKR. L.J. 1, 4-5 (2008).

270. B. Jessie Hill, *New Scholarship on Reproductive Rights: Reproduction Rights as Health Care Rights*, 18 COLUM. J. GENDER & L. 501, 502-03 (2009) (“A positive right is generally considered to be an *entitlement* to something—a right to call on the government to provide, at government expense, a particular public good, such as shelter, education, or medical care. . . . Negative rights, by contrast, are simply rights to be free of governmental interference with one’s decision to do something; they are ‘negative checks on government, preserving a sphere of private immunity’”).

271. See *id.*

272. See *id.*

273. See *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 499 (2003) (suggesting a university’s mission to educate its employees to be important); *Cincinnati v. Discovery Network*, 507 U.S. 410, 437 (1993) (“[The Court] ha[s] consistently recognized the importance of education to the professional and personal development of the individual.”); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 4, 30 (1973) (“[T]he grave significance of education both to the individual and to our society cannot be doubted.”).

274. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 724-25 (2007).

the scope of this Article, but in the context of education, the primary function of a positive fundamental rights analysis would be to scrutinize a government's failure to provide high-quality education. Unlike the current negative rights analysis, the emphasis would not be on whether to void existing laws or bar government action, but on whether to mandate that action be taken.²⁷⁵

The doctrine of *stare decisis* does not make judicial recognition of a fundamental right to public education impossible. Explicit recognition that positive fundamental rights or duties require a new, different type of constitutional analysis would allow the Court the freedom to go beyond its currently narrow rights jurisprudence, which would have an impact in areas that go beyond the education context.

We are living in a transitional point in U.S. history that bears similarities to the circumstances surrounding the New Deal. This moment of political and economic change carries with it the possibility for what Ackerman describes as a constitutional moment that transforms jurisprudential thought. Judicial recognition of a government duty—a positive right to public education—would be just one of many potential positive new rights that could flow from a duty-centered rights analysis.

Bruce Ackerman describes at some length the significance of social movements in driving changes in jurisprudential thought.²⁷⁶ Ackerman describes the point at which a social movement is capable of achieving such a shift in jurisprudential thought as a *constitutional moment*.²⁷⁷ According to Ackerman, constitutional moments are “rare moments when transformative movements earn broad and deep support for their initiatives. Once a reform movement survives its period of trial, the Constitution tries to assure that its initiatives have an enduring place in future political life.”²⁷⁸ The goal of these transformative social movements is to amend societal understandings of the Constitution. Their success in doing so, according to Ackerman, does not necessarily require a textual, Article V constitutional amendment.²⁷⁹ Rather, the Constitution can be and has been amended extra-textually through successful transformative movements.²⁸⁰

275. See *Rodriguez*, 411 U.S. at 33-35. The Court refused to mandate equal access to quality education, but instead limited its options to either declaring the system unconstitutional or upholding the system. See *id.*

276. BRUCE ACKERMAN, *WE THE PEOPLE TRANSFORMATIONS* (1998).

277. See *id.* at 160, 248, 409-11, 420; Michael Salerno, *Reading Is Fundamental: Why The No Child Left Behind Act Necessitates Recognition of a Fundamental Right to Education*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 509, 539 (2007) (implies a fundamental right to education through creation of NCLB).

278. See ACKERMAN, *supra* note 276, at 4-5; Salerno, *supra* note 277, at 539.

279. See ACKERMAN, *supra* note 276, at 15; Salerno, *supra* note 277, at 539.

280. Once a social movement has succeeded in organizing a broad enough base of Americans for a fundamental shift in our overall social, political, and legal understandings, then

VI. CONCLUSION

The government's role in providing public education is more than simply preparing its youth to govern. The purpose is both to safeguard liberty and to satisfy the State's positive duty to provide all children an equal opportunity to fully develop their capabilities.²⁸¹ There is an intimate link between education and democracy, as well as between education and economic prosperity. Education becomes increasingly important as electoral choices continue to require the understanding of ever more complicated issues. A denial of a quality education is a denial of the intellectual tools necessary for the meaningful exercise of the franchise, amounting to an effective denial of the right to vote.

An ongoing negative rights bias, embodied in the Court's libertarian perspective, has stifled the development of a positive rights-based jurisprudence. A new positive rights-based jurisprudence is necessary for appropriately addressing the distinct issues regarding state duties, such as the duty to provide a public education. Without an equitable distribution of the educational tools necessary for success in the economic marketplace and in America's democratic society, the very foundation of American society is called into question. Insofar as a broad, transformative movement would highlight the inequitable distribution of educational opportunities, foundational questions as to societal legitimacy and the appropriateness of America's assumed meritocracy will inevitably be raised. In the face of a sufficiently widespread social movement, courts will have little choice but to recognize the existence of a positive right to public education.

Transforming the doctrine regarding the right to public education is a task of constitutional proportions. The movement to recognize a fundamental right to public education could, and should, spearhead an even broader jurisprudential movement that goes beyond the current negative fundamental rights analysis that focuses on preventing government action. What is needed is a constitutional analysis for protecting positive fundamental rights in order to ensure that government fulfills its constitutional duties to the people.

the possibility exists for constitutional codification, either by means of a textual amendment, or through judicial opinions, rather than through formal amendments. The above-described story of the education doctrine, post-*Rodriguez*, would therefore not be the story of a slavish adherence to *stare decisis*, but of a social movement that had not reached the point where it could effect a full and complete shift in jurisprudential thought. Such an action may have been seen as the manifestation of what Ackerman characterizes as a constitutional moment, had the Court overruled *Plessy* outright. See ACKERMAN, *supra* note 276, at 160, 183-85, 248, 409-11, 420; Salerno, *supra* note 277, at 539.

281. See Salerno, *supra* note 277, at 539.